SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1967
No. 154

LUCILLE MILLER,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

On Writ of Certiorari to the Supreme Court of the State of California.

BRIEF FOR THE RESPONDENT.

THOMAS C. LYNCH,
Attorney General,
WILLIAM E. JAMES,
Assistant Attorney General,
PHILIP C. GRIFFIN,
Deputy Attorney General,
600 State Building,
Los Angeles, Calif. 90012,
Attorneys for Respondent.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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BRIEF FOR THE RESPONDENT.

OPINIONS BELOW.

The original opinion of the California District Court of Appeal for the Fourth Appellate District was set forth in 245 A.C.A. 111. A modification was set forth in 245 A.C.A. 732. The opinion as modified and the order of the Supreme Court of California denying a hearing are reported in 245 Cal. App. 2d 112, 53 Cal. Rptr. 720.

The various opinions are set forth in Appendices A and B of the Petition for a Writ of Certiorari to the Supreme Court of California of petitioner.

JURISDICTION.

Jurisdiction is conferred on this court by Title 28, section 1257(3), United States Code.

The judgment of the District Court of Appeal was entered on September 22, 1966. On rehearing, the modification was entered on October 22, 1966. The Supreme Court of California denied a hearing by an order entered on December 14, 1966.

A timely petition for writ of certiorari was filed in this Court. A response was requested of respondent. After submission of the response, a second response was requested of respondent. After submission of the final response, the petition for certiorari was granted on December 4, 1967, in number 1383 O.T. 1966.

STATUTES INVOLVED.

Relevant statutes and constitutional amendments, federal and state, are set forth in the Appendix.

QUESTIONS PRESENTED.

1. Are the constitutional rights to counsel and against self-incrimination violated by the introduction of admissions made to an undercover agent placed in Petitioner's jail cell by the police.
2. Can the harmless error rule be applied to a conviction where evidence of Petitioner's admissions made under circumstances like those here involved was introduced.

SUMMARY OF FACTS.

Dr. Gordon Eugene Miller a dentist died in a matter of seconds as a result of an incendiary conflagration started in the passenger compartment of his Volkswagen, with an accelerant, on a dark, lonely, deserted road while sound asleep from an overdose of Nembutal, which he was not i the habit of taking and which had not been in his system for more than two to four hours.

Petitioner, his wife, was the only person that could have given him the drug which she had procured without his knowledge. Petitioner was the only person who could have started the fire. She had long since lost her affection for him and given it to another man.

There were many circumstances shown by the evidence contradicting petitioner's story of the action of the auto before the fire started supporting the prosecution's theory of a deliberately started fire. Among others was the evidence that the fire could only have been started by an accelerant; the facts that Dr. Miller was sound asleep from an overdose of Nembutal which he wasn't in the habit of taking, and which could only have been given him by petitioner, as petitioner stated that he did not get the Nembutal, that she had purchased it; that petitioner drove on a dark, lonely, deserted road; that petitioner had given Dr. Miller pills all week which were making him dizzy; the peculiar circumstance that a man recovering from the flu would ride many miles late at night bundled up in a blanket to get milk; that petitioner chose the leased car with which she admitted she was not too familiar instead of her larger, more comfortable one; and the fact that the damage to the Volkswagen was not consistent with an accidental fire.

The evidence supported the prosecution's theory that petitioner had planned for the car to go over a wall, land on the gas tank and be set afire; that she attempted to drive the vehicle over the edge but was thwarted. As the rear wheels spun, the car settled on a rock. A reasonable inference can be drawn that petitioner had stopped the car on the pavement, spread the gasoline, put the car in low gear and started it to-

wards the edge, that it was stopped by the shoulder and that after repeated attempts to run the car over the edge, petitioner lit the fire. The only parts of petitioner's body that were singed by fire were a slight singe of the hair on the back of her head and on her right forearm. This was consistent with the singeing having occurred as she reached toward the gasoline flowing from the tilted can with a burning stick and turned her face away as she set the fire. As the car was to close to the retaining wall, petitioner could not have run around the car to the doctor's side, as she testified, without falling over the wall.

A reasonable inference is that petitioner wanted Dr. Miller's body to be consumed to avoid the discovery at an autopsy of the barbiturates. When arrested she had asked the officers if there was enough left of the doctor for an autopsy. Petitioner made no reasonable effort to save the doctor after the fire. Petitioner was wearing Dr. Miller's watch and no trace was found of his wallet which contained considerable money and from which she took the money to pay for the milk.

There was evidence that petitioner was a selfish and avaricious woman who had long before lost all love and interest in her husband and the life he was providing for her. She wanted another man's love, money, social status, prestige, and association with wealthier people.

STATEMENT OF FACTS.*

The Crime.

In the early morning hours of October 8, 1964, petitioner came to the home of Marice Swenson on Saphphire in Alta Loma and said, "Help me. Help me. My car is on fire. Cork is all burned." She said she did not know on what street the car was located. [Rep. Tr. pp. 63-66.] The fire was on Banyan ½ mile away. [Rep. Tr. pp. 1369-71.] Mrs. Swenson got in touch with the sheriff. [Rep. Tr. p. 67.] Mrs. Swenson was unknown to petitioner, however, Catherine Bridge, who lived on the corner of Banyan and Cornelian, had met petitioner in June of 1964 when petitioner used her telephone after an accident. [Rep. Tr. pp. 702-06.] While waiting for the sheriff, petitioner said that the boys would miss their dad; that 1964 had been a terrible year, and that they had gone to the store. She rambled on about various things. She said that she thought that she had a bump on her head and asked Mrs. Swenson to look, but Mrs. Swenson could not see anything. As petitioner leaned over, Mrs. Swenson smelled the scent of burned hair on the back of petitioner's head. Petitioner was playing with a white scarf that was scorched. Her face and hands were smudgy; her clothes were rumpled, but Mrs. Swenson did not notice any special dirt or disarray. [Rep. Tr. pp. 68-70.] She was wearing her husband's watch. [Rep. Tr. pp. 1394, 1398-1401.]

Harold J. Lance, an attorney friend of petitioner, arrived in response to a call from Mrs. Swenson and petitioner told him what had happened. She said, "Oh,

*Page references are to the Reporter's Transcript and Appendix to Brief for the Respondent.

my God, it's terrible, Harold, Cork's dead. He's all burned up." When Lance asked if Cork was dead petitioner said, "Oh, yes." She told Lance that she was not sure of the name of the street but that she thought it was where her previous accident had occurred. They started to drive to the scene [Rep. Tr. pp. 105-08] when Charles Hogancamp, Chief of the Alta Loma Fire Prevention District, drove up. They all attempted to go to the scene of the fire but petitioner allowed them to proceed in the wrong direction for about a mile until she was questioned by Lance at which time she directed them back down hill to Sapphire and Banyan from where they could see the burning Volkswagen. [Rep. Tr. pp. 74-77, 80, 108-09.]

There was no one at the fire. The door on the left side was wide open and the trunk lid was closed. The engine lid was closed. The Volkswagen was burning at the rear, around the motor and the rear tires. Hogancamp saw a body on the seat of the Volkswagen. He opened both the trunk and the engine lids. [Rep. Tr. pp. 80-90, 109.]

California Highway Patrol Officer Robert A. Robinson having received a call to proceed to the Alta Loma area arrived at the scene of the burning Volkswagen at 2:20 a.m. He noticed the fire burning in the rear portion of the passenger compartment and the engine compartment. [Photo Exs. 7, 10, 14, 15, 16.] The remains were still in the car. He saw a can directly behind the driver's seat. [Rep. Tr. pp. 344-48, 385.]

Later when petitioner returned to the scene with Lance, Officer Robinson had a conversation with her. [Photo Ex. 8.] She said that she had been driving the Volkswagen east on Banyan about 35 to 40 and had

gone only a short distance from Sapphire Street when the Vehicle pulled to the right or the left. She was not sure which way. The vehicle was off to the right side of the roadway, and the fire was immediately at the back of her head. She got out of the car at that time, went around to the right side of the vehicle and attempted to get the right door open. The door was locked. She used a rock to break the right rear window of the Volkswagen. By that time the flames were too hot and she was unable to do anything. She appeared calm. She was not crying and only became upset when one of the photographers took a picture. [Photo Ex. 8.] Petitioner told Officer Robinson that her husband and she had left the house about 11:30 to go to Woody's on Euclid, but it closes at midnight and was closed. They needed milk so they drove over to Montclair to the Mayfair Market on Central Avenue. After they got the milk they were en route home, and she turned right from Sapphire to Banyan. The fire singed the hair on the back of her head. Her husband was lying across both seats. He asked her what had happened to the left front of the car, and she said that her husband hit a German Shepherd that day on Cornelian Street about 7 p.m. and they had stopped and talked to the owner. She said that when the car first got in trouble, Dr. Miller had said, "Oh," or something similar. She said that she thought that Dr. Miller was knocked unconscious—that he must have hit his head, but she did not see him hit anything. He asked her whether she used Banyan Street frequently, and she replied that she did and had last used the start the day before. [Rep. Tr. pp. 110, 351-53, 361-69, 684.]

The Volkswagen was on the outside of the roadway on the dirt shoulder. A portion of it was on the pave-

ment. Officer Robinson saw a 30-40 foot tire mark leading from the edge of the roadway, leading up in an easterly direction across the dirt shoulder portion of the roadway to the right rear tire and in the same line as the car. The mark had been made by an inflated tire as distinguished from a tire that was flat or in the process of deflating, for there was no indication of distortion or wobbling within the mark itself. [Rep. Tr. pp. 354-56, 468-69, 495-98.]

Detective Charles A. Callahan from the San Bernardino County Sheriff's Office arrived at the scene at about 5:52 a.m. and helped take some measurements. The Volkswagen was parked on the dirt shoulder of the road by a lemon grove with the wheels cramped toward a retaining wall with a four foot dropoff. The front wheels were 10 inches and the back wheels 2 feet from the wall. [Photo Ex. 18.] [Photo Exs. 17, 19.] The tires of the Volkswagen except for the left front were burned through to different degrees and deflated. The right rear wheel was in a hole which he later inspected. [Photo Exs. 20, 21, 22; Rep. Tr. pp. 387-99, 468-69, 495-98.]

Joseph Milton Karr, a Homicide Detective, and Sergeant William Paterson, both of the San Bernardino Sheriff's Homicide Bureau went to the scene of the Miller Volkswagen fire. They noticed a branch with one end charred just below the end of the left door which Sergeant Paterson later retrieved. [Ex. 35.] [Photo Exs. 7, 29.] [Rep. Tr. pp. 802-10, 691-94.]

John Robert Davidson, a criminalist employed by the San Bernardino Sheriff's Office crime laboratory, went to the scene at 7:25 that morning. He looked inside the car at the rear seat area [Photo Ex. 13]. There

was a large rock in the middle of the seat against the far wall. He removed it and determined that it weighed nine pounds. He found the ash remains of a Poloroid Land camera and a pamphlet concerning that camera, which he removed. He found no remains of a blanket or a wallet.

There was a one-gallon metal can on the floorboard just in front of the back seat on the driver's side which he removed and took to the crime laboratory with the other things. [Exs. 28, 29.] The can did not have a cap on it and was similar to the can produced in court. [Ex. R.] Some writing visible on the can corresponded to the can marked Exhibit R. [Rep. Tr. pp. 420-26, 459-60, 556].

Davidson examined the can with a J-W aromatic hydrocarbon indicator (a sniffer). There were no hydrocarbons indicated. Under the circumstances of the fire, he would not expect that gasoline would remain in the can. The can showed no indication of distortion or bulging. The neck was still on it. The threads had a burned residue, but were not stripped. After the examination of the can, it was left in the laboratory, but not placed in the evidence locker, and the janitor threw it away. [Rep. Tr. pp. 427-32.]

Davidson looked inside the car in the area of the front seat. [Photo Ex. 11.] The contents of the glove compartment were burned. (Road maps, papers, warranty or service booklets, serial number tag.) He examined the doors and found there was no glass left in them except for some glass in the top channel of the left door. He concluded that the window of the left door had been all the way up at the time of the fire, while the window of the right door had been nearly all

the way up. The ignition was on. The gear shift was in first gear. The hand brake was off. The heater was turned on. The headlight switch was in the parking light or middle position, which was determined by measuring the stem in the three positions and comparing the distances with other Volkswagens, and as shown by the burn mark. [Rep. Tr. pp. 433-40, 1745-50; Ex. 43.]

Anthony Longhetti, a Sheriff's criminologist, also examined the gas can found in the Miller Volkswagen and found it to be in the same condition found by Davidson, the other criminologist. [Ex. 28; Rep. Tr. pp. 568-69.] During the trial Longhetti burned two cans comparable to Exhibit R in a fire while the lids were securely tightened, one can filled entirely with gasoline and the other one-third filled. Both cans exploded. The top and the neck spout came out from the can itself. As soon as possible the cans were smelled and no trace of gasoline odor was present. Within an hour the cans were tested with a J-W aromatic hydro-carbon indicator and the test was negative. [Photo Ex. 31; Rep. Tr. pp. 571-76.]

On November 18, 1964, a 1964 Volkswagen was burned experimentally under similar conditions as the Miller Volkswagen fire. [Rep. Tr. pp. 503-16.] In that experiment, Longhetti placed a gas can similar to Exhibit "R" inside the car. It was placed in the left rear behind the seat of the automobile, and approximately one-third to one-half of the gasoline was allowed to run out of the can onto the rear floor of the vehicle. The can was left in a position almost on its side slightly tilted upward with the cap off essentially in the position of the can depicted in Photo Exhibit 28. After the fire Longhetti examined the can. It was in the

same condition as the can in the Miller Volkswagen fire. The handle was off but the neck or pouring spout was still intact and present on the can. [Rep. Tr. pp. 559-71.] The results of the experimental burning were practically identical to those of the fire in question. [Rep. Tr. pp. 335-40, 551-55.]

An examination by Davidson of the battery and the battery cable leading to the generator on the Miller Volkswagen show no evidence of an electrical short. [Rep. Tr. pp. 442-43.] An examination by Davidson of the left front tire and rim of the Miller Volkswagen show no evidence of a blowout though a nail was present. [Exs. 23, 24; Rep. Tr. pp. 443-47.] An experiment with an identical tire with an identical nail inserted proved the tire would not lose pressure or blow out from the presence of the nail. [Ex. 25; Rep. Tr. pp. 449-52.] An examination by Davidson of the gasoline line on the Miller Volkswagen and experiments with an identical gas line [Exs. 26, 27] proved that the gasoline line could not have come off without a pull of 25 to 30 pounds when soaked in gasoline, 35 to 50 pounds when wet with gasoline running through the tube, and 55 to 58 pounds when dry. [Rep. Tr. pp. 452-55.]

At about 5 p.m. on October 8, 1964, Dr. Irving Root, M.D., a pathologist performed an autopsy on the body of Dr. Gordon Miller in Ontario at Draper Mortuary at the request of the County Coroner's Office. Present were Dr. F. Rene Modglin, and Longhetti. [Rep. Tr. pp. 112-15.] Dr. Root determined that the cause of death was conflagration. He found respiratory tract burns, almost complete charring of the body, a saturation of approximately 20 per cent of carbon monoxide in the blood so as to indicate that Dr. Miller was

alive at the time the fire began and his death was essentially due to conflagration. Dr. Root was unable to determine any antimortem physical injuries. Death occurred in a matter of seconds because of the inhalation of flames shown by the burns of the respiratory tract and the extensive heat both causing death. [Rep. Tr. pp. 115-20, 176-79.]

Chemical analysis of blood and organs by Longhetti showed no alcohol, a carbon monoxide saturation of 20 per cent, a blood barbiturate level of 13.7 micrograms per milliliter of blood consisting of itobarbital commonly known by the trade name of Sandoptal, and Pentobarbital, commonly known by the trade name Nembutal, a urine barbiturate level of 5.9 micrograms per milliliter of urine and a liver barbiturate level of 29.5 micrograms per gram of liver consisting of the identical barbiturates found in the blood. [Rep. Tr. pp. 132-48.] On October 14, 1964, Dr. Modglin found a 13 percent saturation of carbon monoxide in the blood, 15 micrograms of barbiturates per milliliter of blood consisting of Pentobarbital, commonly called Nembutal and Sandoptal, a Swiss drug not common in the United States but found combined with a mild pain reliever one of which is Fiorinal. Dr. Modglin testified that the effect of Nembutal lasts about three to six hours, while Sandoptal has a maximum effect of about three hours. Both are to relax and produce sleep. The barbiturates are absorbed, get into the blood stream, and are distributed throughout the body. The liver and the kidneys retain most of the barbiturates, and their function is to get rid of them. Barbiturates are not absorbed all at once. The effect depends on how much is given and the other contents of the stomach. The effect

is expected within a half hour. The amount of barbiturates in the blood stream will gradually rise until no more is present in the stomach. It will then reach a more or less constant level and very slowly be eliminated from the blood. It will drop rapidly from a maximum and will then reach a more or less steady point where it will begin a slow elimination. [Rep. Tr. pp. 180-87.]

Based upon Longhetti's findings, Dr. Modglin was of the opinion that the barbiturates had been in association with Dr. Miller for a matter of only two to four hours. [Rep. Tr. pp. 187-90.] Barbiturates are hypnotic drugs and induce sleep, and the amount indicated in the above analysis was a much higher level than a normal therapeutic dose. It was not enough in blood level to expect to have produced death. It was enough in blood level to produce sleep but doubtful that a coma would be caused. It is possible for one to take considerably larger than a therapeutic dose unknowingly and without realizing it because barbiturates have a mind-dulling action. Such action can cause a person to forget that he has taken a barbiturate and take more. It is medically possible to empty a bottle in such a fashion. [Rep. Tr. pp. 190-91.]

William Arthur Snare, a Special Agent for the National Automobile Theft Bureau, a nonprofit organization for the investigation of automobile identification vehicle theft number restorations and automobile fires in cooperation with law enforcement, assisted in the investigation of the fire involving the Miller Volkswagen. He was an expert in automobile arson and had conducted 113 experimental automobile burnings. [Photo Ex. 7; Rep. Tr. pp. 202-07.] Based upon his examina-

tion of the car and his expertise Snare reached certain conclusions about the fire. The left passenger door had been opened at least 18 inches at the time of the fire. The right passenger door had been closed. All the car upholstery had been burned. [Photo Exs. 11, 12, 13; Rep. Tr. pp. 219-26.] The glass on the left front door had been in a raised or closed position during the fire. The wind wings were closed during the fire. Most of the floor of the vehicle had been burned. There was a trace of Dr. Miller's slacks on the seat. The remains of two milk cartons and a manilla bag were present. [Rep. Tr. pp. 226-29.] The gas can cap was found just inside the door and removed from the car by Deputy Sheriff Fred Smith. The cap was undamaged. There was no indication that the cap had been on a can which had exploded. There was a flex pouring stem from the gas can directly behind the driver's seat. Deputy Fred Smith removed it. Near the remains of the milk carton there was a five by four inch piece of glass which appeared to have come from the rear window. The upholstery of the Volkswagen was a vinyl material which would not burn by itself in that only the gases it gives off will burn. Heat must be applied continuously from other materials in order to entirely consume such material. [Rep. Tr. pp. 230-33, 259-60, 717-27.] There was no way for gasoline to have gotten from the fuel line between the gas tank and the engine into the passenger part of the vehicle. The flex gas line of the vehicle was made of cord re-enforced neopreme, a nonexplosive nonfire sustaining material which will not burn if the source of ignition is taken away from it. The fuel line had been in position at the time the fire started and was burned off. The gas

line where it connects to the fuel pump and the carburetor had been in place at the time of the fire. [Rep. Tr. pp. 234-37.] The area of greatest heat was to the left side of the vehicle. [Rep. Tr. p. 237.] There was no evidence of electrical short in the battery or in the battery cable as it passes through the passenger compartment through a hole in the firewall to the generator. [Rep. Tr. pp. 238-42, 259-60.] There was no evidence of overheating of the car engine prior to the time of the fire. [Rep. Tr. p. 253.]

The fire had originally started at seat level in the passenger compartment. [Rep. Tr. pp. 328-30, 242.] The fire in the passenger compartment burned out and then a second fire originated underneath the car as a result of gasoline draining out of the car itself. After the fire had burned for some time, it burned off the flexible coupling, allowing the gasoline to drain from the gas tank into the gas line and to the ground underneath the rear portion of the car. Snare was unable to find any nonhuman source or origin of the fire. [Rep. Tr. p. 243.] He concluded that the fire was of an incendiary origin. [Rep. Tr. p. 244.] Furthermore, he was of the opinion that the fire had been started with an accelerant. [Rep. Tr. pp. 261-62.] It is practically impossible to start a fire in the passenger compartment of a car without an accelerant and when this is accomplished it takes several minutes to an hour for flames to appear and such a fire will not totally destroy a car in the fashion the Miller Volkswagen was destroyed. [Rep. Tr. pp. 244-46.] Fires which start in the engine compartment cause the immediate cessation of engine operation. [Rep. Tr. pp. 253-56.] Where a fire starts in the engine compartment from gasoline leakage there

is an odor of gasoline in the car and a trace of gasoline drippings behind the car, none of which appeared in the Miller Volkswagen fire. Assuming a fire in the engine compartment of the Miller Volkswagen car the engine would not have kept running and the rear wheels could not have dug into the ground. [Rep. Tr. pp. 256-58.] The use of an accelerant is indicated by a rapid and complete burning of flammable materials in a car such as found in the Miller Volkswagen. Large quantities of unburned material are found where no accelerant has been used. [Rep. Tr. pp. 61-62.]

Manfred Kase, a Volkswagen mechanic with training and experience of six years, examined the Miller Volkswagen on October 11, 1964 in the presence of Detective Karr. There was no defect in the steering. [Rep. Tr. pp. 583-85.] There was no damage to the gas tank or the fuel line. [Rep. Tr. pp. 585-86.] The right front door was locked. The damage to the left front fender under the headlight which had been caused by striking a German Shepherd did not effect the steering. [Rep. Tr. pp. 215-17, 589-90.] The gear shift was in first gear position. The gears themselves were not in third or fourth. Low gear was missing. [Rep. Tr. pp. 634-35.] In that gear the Volkswagen can go 20 miles per hour. At idle speed in first gear the Volkswagen will go walking speed. [Rep. Tr. p. 590.] He had seen a half a dozen Volkswagens that had had fires in the engine compartment and in none of these cases had the fire progressed into the passenger compartment. In most instances, the fire was due to the failure of the car mechanic. Engine fires cause the engine to stall. [Rep. Tr. pp. 591-93.]

On November 17, 1964, Heinz K. Ofner, field service engineer for Competition Motors Volkswagen Distributors for Southern California and Arizona examined the Miller Volkswagen. He had been a Volkswagen mechanic since 1950 in Germany. There was no deficiency in the steering of the Miller Volkswagen. [Rep. Tr. pp. 603-07.] There was no damage to the gas tank. [Rep. Tr. p. 608.] The passenger compartment was entirely protected from the gas line. [Rep. Tr. pp. 609-18.] There had been no difficulty with neopreme gasoline tubes on Volkswagens unless very old and removed many times. They won't work off [Rep. Tr. pp. 620-21, 1852.] Only fresh air and no exhaust can get into the heating system of the Volkswagen. [Rep. Tr. pp. 622-25.] If the engine overheats it will eventually stop and the driver is warned by a red light. [Rep. Tr. pp. 627-31.] Fire in the engine compartment would kill the engine and the fire could not be drawn through the car heating system. [Rep. Tr. pp. 637-44.] A fire could not enter the passenger compartment from the engine compartment until a rubber grommet surrounding the battery cable had been burned away. [Rep. Tr. pp. 636-47.] A fuel line leak would leave a trail of gasoline on the pavement and if ignited it would be a flaming trail. The flames could not get to the engine compartment because it is sealed off. [Rep. Tr. p. 647.]

The inside measurement from door to door on the front seat of a Volkswagen is three feet nine inches. To lock the right front door the handle is pushed forward until it stops and then it snaps back into the normal position. The doors open from the inside by pulling back on the handle whether it is locked or not. [Rep. Tr. pp. 1848-50.]

On the week of his death Dr. Miller had not worked all that week. He came to his office to look at his mail on the afternoon of October 6, 1964 for half an hour, at which time he told his dental assistant, Gwen McIntosh, that he couldn't stay in the house any longer; that he felt better but was still dizzy now and then, and sometimes could not focus his eyes. He said that he had been taking large brown capsules given him by petitioner that had made him dizzy and that he was not going to take them any longer. [Rep. Tr. pp. 792-94.] She had never seen him when he appeared to be under the influence of a drug and he only used to take two Fiorinal tablets at any time. Pills such as PAC with cyclopal for pain, Seconal and Fiorinal were available at Dr. Miller's office as he was a dentist. Petitioner had had these various pills brought home by Dr. Miller on occasions. [Rep. Tr. pp. 797-99, 1946-51.] Primarily, Dr. Miller only used Seconal and Fiorinal for headaches. [Rep. Tr. p. 1464.]

On October 1, 1964, Dr. Miller had shot a game of golf and had not shown any signs of being under the influence of any drugs. [Rep. Tr. pp. 1987-88.] Dr. Miller's accountant, Walter R. Nourse, never noticed him to appear under the influence of a drug. [Rep. Tr. pp. 1934-35.]

Two or three days prior to October 8, 1964, petitioner had bought a gallon of regular gasoline from David Beitzell at a Chevron Service Station after he had directed her to the Shopping Bag Market to purchase the gasoline can of the same type as Exhibit "R." [Rep. Tr. pp. 710-15, 1836-40.]

About 9 to 9:45 a.m. on October 7, 1964, petitioner came to the home of Dr. Edwin H. Ford, M.D., a friend

of the family and talked with Dr. Ford and his wife. She said that Dr. Miller had the flu and was dizzy. She said that she was going to a drugstore in Chino to get medicine including sleeping pills and Dr. Ford gave her six to eight one and one-half grain Nembutal capsules. Petitioner said, "He usually gets quite a few more than that. Couldn't I have a few more?" [Rep. Tr. pp. 751-55, 1413-18.]

About 10 to 10:30 that same morning, petitioner went to the Huntington Pharmacy in Upland and had the pharmicist Paul Robert Nave call Dr. John Mortenson from which he got a prescription for 30 Nembutol and one-half grain capsules which he gave to petitioner. [Rep. Tr. pp. 736-39.]

Late that night about 12:20 Niesha Chaplin saw petitioner driving the Volkswagen and next to her on the seat Mrs. Chaplin noticed a large lump of bundles which on closer observation appeared to be a human being. The person appeared to be lying in a slumped position with his head far to the side of the door. [Rep. Tr. pp. 160-66.] Petitioner pulled into the same parking lot at the market but parked on the edge of the parking lot away from the light standard. Petitioner got out of the car, leaned over, looked back inside to the driver's open window and then walked into the store. [Rep. Tr. pp. 164-68, 1387.]

The Motive.

Dr. Miller had over $100,000 of life insurance including double indemnity payable to petitioner of which petitioner had knowledge. [Rep. Tr. pp. 952, 1070-71; 1194-98.] (A. pp. 31-32, 53-54, 94-98.) In 1964 Dr. Miller's net income before taxes had dropped from

$27,430.86 before taxes to $15,299.76. [Rep. Tr. p. 939; A. pp. 30-31.] The Millers had debts of $64,000 of which $30,000 was attributable to the recent construction of their new home, the building of which the doctor did not favor, although he went along with it to keep peace in the family. The debts also included a debt of $3,597 on a Mustang automobile. [Rep. Tr. pp. 946-47, 954-57, 1931-33, 953-54.]

Arthwell C. Hayton is an attorney at law with offices at San Bernardino and Loma Linda, residing in Redlands, California. [Rep. Tr. p. 1115.] In 1956, he and his wife lived in the Ontario area and he practiced law in Upland. At that time, Dr. Miller and petitioner moved into the area and they became close friends. Hayton has four children. His 12 year old daughter was a playmate of petitioner's daughter Debra. The two families went to the Seattle World's Fair *together in 1962 or 1963.* [Rep. Tr. pp. 1116-17.] At one point of the trip they rode in Dr. Miller's Thunderbird, and Hayton saw no evidence of an extra can of gasoline. [Rep. Tr. p. 1118.]

Over the past five years, petitioner talked with Hayton quite frequently about getting a divorce from Dr. Miller. *She told him that she never really loved Dr. Miller; that she felt that it was a mistake that they were married in the first place; that she was very young at the time; and that while she had lived with her husband and had children with him that they were never really suited for each other and that she did not feel that she could continue to live with him.* [Rep. Tr. pp. 1119-20; A. pp. 68-69.] Petitioner told Hayton that she was primarily concerned about the fact that if she divorced Dr. Miller, while she thought she could

get along as far as a person, she might not get along financially, and discussed with him whether he thought that she could get child support and alimony sufficient to keep her and support her. [Rep. Tr. p. 1121; A p. 69.]

Retitioner came to Hayton when she was first contemplating building the new home on Bella Vista in Alta Loma. Hayton talked to Dr. Miller about it also. Petitioner told Hayton that Dr. Miller was opposed to the building of their new home; that he was happy where they lived; that he felt they could not afford it, and that he did not want to get into the financial program of such a big project. Petitioner told him that she felt the home that they were living in was not adequate. he said, "All my other friends are having new homes," naming them, "And that is something that I have always wanted, and that's something that I am going to have." [Rep. Tr. pp. 1162-63.]

Erwin Sprengel built the home on Bella Vista for petitioner in the early months of 1964.

Petitioner told Sprengel that she did not want him to discuss the financial problems of the construction with Dr. Miller because they did not see eye to eye regarding the finances, and that if he did betray her confidence, he'd rue the day. [Rep. Tr. pp. 825-26, 842-44, 890-94.]

During the period of construction; petitioner told Sprengel that *she disliked her husband;* that he had high principles and didn't see eye to eye with her financial dealings. On one occasion Sprengel asked her a question, and in reply *she said that she really didn't care what Dr. Miller thought about it; he had cut him-*

self off from her and if he tried to do anything about it, he'd get his. [Rep. Tr. pp. 829-30; A. pp. 3-4.]

Between the end of November 1963 and June 1, 1964, Hayton saw petitioner on many occasions. They went riding in his car together. They went to Palm Springs together. They registered in motels together on two or three occasions, one of which was in June of 1964. [Rep. Tr. pp. 1181-82; A. pp. 92-94.] They first went to a motel in November of 1963 in Arcadia. On that occasion petitioner had asked Hayton to spend the evening with her, and she had asked him to go to the motel. She had asked him to come over to her home, and from there they talked about where they would go. On the occasion that they went to Palm Springs together, Hayton and petitioner were intimate at the Spa Motel. [Rep. Tr. pp. 1190, 1207, 1224; A. pp. 94, 98-99, 101.] Hayton was not in love with petitioner. [Rep. Tr. p. 1226.]

Several Months before Dr. Miller's death, at their beach trailer, Dr. Ford and his wife were discussing with petitioner her relationship with Arthwell Hayton. Dr. Ford advised petitioner that he did not think the romance, if such existed, was sincere on Hayton's part, and to forget about it. *Petitioner said that it was sincere on her part.* [Rep. Tr. pp. 768-78; A. pp. 1-3.]

Eleanor Brookins was Arthwell Hayton's legal secretary for the past 15 years. During the time that preceded June of 1964, petitioner was a frequent visitor at the San Bernardino office, and made frequent phone calls there. [Rep. Tr. pp. 969-70.]

Wenche Berg was Arthwell Hayton's housekeeper from June 7, 1964 on. The house received daily tele-

phone calls from petitioner during that period of time. [Rep. Tr. pp. 997-98; A. pp. 38-39.]

On about April 20 or 21, 1964, petitioner suggested that Hayton divorce his wife and marry her. He told her that he would not divorce his wife. She replied that she was quite persistent and would wait for him. She had called him and had arranged a meeting for lunch at the Holiday Inn. At lunch *she told him that she had definitely decided to divorce Dr. Miller; that she could not live with him any longer; that she had thought about it on other occasions, but had put it off, and that now she had made a decision. She said that regardless of what happened, she was going ahead and file a divorce action and asked him to recommend an attorney.* He recommended Mr. Beloud in Ontario. She said that she had had enough of living with Dr. Miller; that he was completely unhappy and irrelevant in his feelings about her desires for her home that they were building, and that she just could not live with him any longer. [Rep. Tr. pp. 1121-25; A. pp. 69-73.] The conversation is fully set forth in Appendix to the Brief for Respondent at pp. 69-73.

Hayton told petitioner that he was worried that Elaine would find out about petitioner and himself. He told her that Elaine had been upset about anonymous telephone calls that she had been receiving, and that he felt petitioner was responsible for them. [Rep. Tr. p. 1205.]

Petitioner had also told Eleanor Brookins that *she felt that the Haytons were not suited for each other; that petitioner thought she was more suited for Hayton than his wife.* [Rep. Tr. pp. 972-73; A. p. 33.]

A few days after petitioner had the above conversation concerning petitioner divorcing Dr. Miller and

marrying Hayton, Hayton's wife, Elaine, died. Hayton had taken his son Bill and five of his playmates on a boating trip to Catalina, and it was while on this trip that he received word over his radio that his wife had died on May 24, 1964. The Coast Guard flew him home. When he landed at the Tri-City Airfield near Redlands, petitioner met him there, as did his sister and another friend. He was upset and petitioner put her arm around him and offered to drive him home. In the days that followed she helped to take care of his children. She kept the two little children with her until the funeral. Hayton remained home for about three weeks, during which time petitioner came back and forth to the house almost daily, transporting the children. She telephoned frequently during this period. About the 1st of June, Pastor Hassenphlugg of Hayton's church paid him a visit at his office, and they had a talk. That day Hayton telephoned petitioner and told her that he could not see her anymore because he had to preserve his reputation. She insisted that he have "the guts" to tell her in person. [Rep. Tr. pp. 1125-30, 1210; A. pp. 72-76, 99.] The entire conversation is set forth in Appendix to the Brief for Respondent at pp. 74-76.

He met her at Harold's Club after that and told her that he didn't want to see her again. [Rep. Tr. p. 1210; A. p. 99.] A couple of days later be brought petitioner a box of candy and gave her a letter. [Ex. D.] In the letter he apologized for certain undesignated events in the last few days and referred to petitioner as one of his and his wife's closest and dearest friends, as well as kind, generous, warm hearted, and loyal, as well as having many other fine qualities. He indicated that he wanted to be alone to think because of his emo-

tional upset and the vicious and malicious reports. He closed by referring to petitioner as his closest friend. At that time he said that he was sorry that they had had the affair and asked her not to see him any more, and thanked her for the kindness to the children. [Rep. Tr. pp. 1187-89, 1212.]

About that time petitioner telephoned Eleanor Brookins at the law office. She said that she had heard that friends of Hayton in Loma Linda and Redlands had been talking against her to Hayton. She said that she knew that Eleanor didn't have any control over what went on in the Loma Linda office, but she wanted her to do everything she could to keep these people from talking to Hayton in the San Bernardino office. *Petitioner said that she wanted to marry Hayton.* Eleanor Brookins told petitioner that she didn't think there was a chance that Hayton would marry her because she didn't think he cared for petitioner that much and, in addition, he was too bereaved over the death of his wife. *Petitioner replied, "Time will tell." She said in a joking manner that in the meantime Eleanor should not get any ideas about marrying Hayton.* [Rep. Tr. pp. 971-72, 979; A. pp. 32-33, 35.]

About June 5, 1964, Hayton received information that petitioner had been in an automobile accident and was injured, as was her daughter Debra. Petitioner had requested him to come to the hospital and he sent his investigator, Robert Peach, who reported back to him. When she had returned home from the hospital, petitioner telephoned Hayton to ask why he had not come to the hospital to see her. He told her that he would take the case. She asked him to come to the house, and he agreed. That night he and his son Bill

went to petitioner's home and she asked him why he would not come and see her. He replied that he did not want to see her or have any communication between her and himself or his children except to handle the legal matter. [Rep. Tr. pp. 1130-33; A. pp. 76-78.]

During the next two or three weeks, petitioner called Hayton occasionally at his offices, but he was curt with her. In one of these conversations about a week after the visit to her home, petitioner said:

> *"Arthwell, certainly by now any gossip or any thing that anybody may have said at Redlands has died down, and Loma Linda, and I would like to see you. Please see me and please let's go down to the beach together. I am going to be down for a week or so at Eddie Ford's trailer and Yolanda and I am going to be down there, and please come on down and let's spend some time down there together."*

He said:

> "Lucille, I, under no circumstances, want to see you. I have made it plain to you that I do not want to see you socially, and certainly I would not go down to the beach or any other place and meet you." [Rep. Tr. pp. 1133-34; A. pp. 78-79.]

Around the middle of June of 1964, Eleanor Brookins had stopped putting petitioner's calls through to Hayton because he had given her instructions that he did not wish to speak with her or see her. After that date, she received numerous phone calls for Hayton from petitioner. She did not put them through, but did not tell petitioner of her instructions from Hayton.

After a time, petitioner started calling person-to-person. These calls were not put through either. The other girls at the office were instructed that no calls were to be put through to Mr. Hayton without announcing them first. [Rep. Tr. pp. 974-75; A. pp. 34-35.]

During this same period of time, petitioner telephoned Erwin Sprengel on numerous occasions and discussed her personal affairs, particularly her interest in Arthwell Hayton. She continued to call him and discuss her personal interest in Hayton after June of 1964. Petitioner asked him to intercede with Mr. Hayton for her on several occasions. Petitioner told Sprengel that for some time she and Hayton had been close friends; that she admired Hayton very much because of his ability as a practicing attorney; that she enjoyed the same social contacts and activity that he enjoyed. *She told him that she had lost any affection whatsoever for her husband; that she did in fact love Hayton, and circumstances permitting, would like to marry him.* She told him that Mrs. Hayton had come to her on occasions to discuss her marriage problems and that she had given Mrs. Hayton advice. She said that she had been quite close to the Haytons, discussing their problems; that she cared for the children and had interceded in their matrimonial difficulties. She told him that she suggested to Mrs. Hayton that she get a divorce from Mr. Hayton. During the period of time when she was having trouble reaching Hayton at home and at the office, she told him about that fact, and that the girls would not let her through even though she thought he was there. She asked Sprengel to carry messages to Hayton, which he did. He knew that petitioner had filed for divorce against Dr. Miller. The

divorce was filed on July 8, 1964. [Certified copy of complaint, Ex. 44; Rep. Tr. pp. 827-32; A. pp. 3-6.]

Sprengel knew that petitioner resumed living with Dr. Miller after the divorce action had been filed. Petitioner told him, while sitting in a car with him at Newport Beach, *that she had gone back to her husband because, if she could not have Mr. Hayton at least a man with a $25,000 a year income was better than nothing.* [Rep. Tr. pp. 832-33, 909; A. pp. 6-7, 26.]

On June 22, 1964, Hayton had gone out to dinner with petitioner, Mr. and Mrs. Sprengel, and Darlene Nemner. That evening Hayton and petitioner went to a motel and registered under the name "Jack Wardruff." [Rep. Tr. pp. 1181-82, 1215; A. pp. 92-94, 99-100.]

Before the end of June, petitioner came to the back door of Hayton's house and told Wenche Berg, the housekeeper, that she was going to take Hayton's youngest boy, Jeffrey, to the mountains. Wenche Berg knew nothing of such an arrangement beforehand. Petitioner took Jeffrey with her. Hayton was at the office at the time and when he came home that night he asked for Jeffrey, and Wenche Berg told him that petitioner had taken him to the mountains. Hayton did not know that he was going; Hayton had not given petitioner permission to take him to the mountains, and did not know where she had taken him. He had been enrolled in a summer bible school, which he missed. Hayton was upset. He later found out that Jeffrey had been at Harold Lance's mountain cabin. Jeffrey came home about a

week later, and after that Hayton gave Wenche Berg instructions that petitioner was not to be allowed to talk to the children. Petitioner continued to telephone the house after that, however. She was told that she could not talk to the children. She continued to telephone. [Rep. Tr. pp. 998-1000, 1146; A. pp. 38-41, 86.]

In July of 1964, Hayton and a woman companion went to a western party for square dancing. Priscilla (Sandy) Slagel, who was a medical student at Loma Linda University, and a close friend of petitioner, and who had lived at the Miller home when she was not at the university, had driven petitioner to the location of the square dance. She was aware that during the Spring and Summer of 1964, *Petitioner was interested in Hayton.* [Rep. Tr. pp. 983-88, 1134, 1217; A. pp. 35-37, 79, 100.] Hayton and his companion left the party about 10:00 p.m. to go to his house for a swim, but on the way decided to drive to Newport instead, where Hayton had a new 42-foot boat. They were followed there by petitioner and Sandy Slagel. Hayton took the boat out around the island and returned about 45 minutes later He moored the boat in its slip with two lines forward, one on each side of the boat, and left the two aft lines on board. He and his companion remained on board watching television, drinking hot chocolate, and doing some necking for about thirty minutes. In the meantime, petitioner and Sandy Slagel had encountered an elderly lady at the dock with whom petitioner discussed the boat, and the lady suggested untying the boat so that it would bob up and down. She and

petitioner proceeded to untie the boat and then they went back to their car and waited for Hayton to appear. When Hayton came out, the boat was partially out of the slip into the bay, fifty feet out of position. He went forward and jumped to the dock and pulled the boat back into the slip by the boat hook. He noticed that the two forward lines had been untied at the dock. He tied up the boat and drove home. Petitioner and Sandy Slagel followed him. On the way he saw petitioner slumped down in the seat of a Volkswagen with Sandy Slagel driving. They followed him but he lost them by a quick exit from the freeway. He took his companion home and returned to his own house where he found the Volkswagen parked in front of his driveway. [Rep. Tr. pp. *986-91, 1135-43*; A. pp. *36-38, 79-84.*] Petitioner jumped out and came to his car yelling:

> *"You so and so, you had better open this door and let me in."*

Hayton said:

> "Lucille, please don't yell. Don't wake up the neighbors."

Petitioner said:

> *"If you let me in and act civilized, I'll talk to you."*

He opened the door and she got in. He asked her if she had been following him all evening, and she said:

> *"I have, Sonny Boy, and I know exactly everything that you have done."*

He said:

> "Lucille, are you out of your mind? I can't imagine anybody doing something so stupid as that. I can't believe that you really have."

She said:

"Well, if you want to know what you did, I'll tell you."

And she described his whole evening from the time he left home, even to peeking in the windows at the square dance and watching him out on the balcony. He said:

"Lucille, I can't understand this. No normal person would do this. How in the world can you do something like this? Its so silly and stupid."

Petitioner said:

"Well, look, I've tried to be nice to you and I've tried to have you be nice to me. You have been putting me off and you won't let me talk to you and you won't let me see your children or get a hold of you at home or at the office, and this is the only way that I can talk to you."

He said:

"Well, I don't want to talk to you, Lucille. I don't want to see you. If I ever did before, this certainly ends any thought I ever had."

He said, "Please leave." She said:

"Look, Arthwell, I want to tell you something. I have never had any man in my life reject me."

"You are not just about the first one to do it."

Hayton said, "Lucille, get out of this car before I throw you out." Appellant got out and drove away in the Volkswagen. [Rep. Tr. pp. 1143-45; A. pp. 83-86.]

About 9 p.m. on July 29, 1964 petitioner telephoned Hayton at his Redlands home and apologized for her conduct down at the boat. Among other things she stated that she wanted to be nice to him and for him

to be nice to her and asked him to come over to her home that evening. After telling her that he did not want to see her Hayton hung up. She called him again twice that night, endeavoring to get him to come to see her or let her come to see him. She threatened him. He refused to talk to her. She had Priscilla Slagle telephone him urging him to come over to see her warning that she might do something terrible if he didn't. But he still refused. (The entire conversation is set forth in Appendix for the Brief for Respondent at pp. 86-90, 35-36.) [Rep. Tr. pp. 1147-50, 1156-58, 984.]

The next day Hayton gave his secretary instructions to dictate a letter immediately telling petitioner that he did not want to represent her further in any way in connection with her case. After the boat incident he had told petitioner that he did not want to handle the case and suggested that she obtain another attorney, but as of that time she had not done so. Eleanor Brookins wrote, signed, and sent the letter. [Ex. S; Rep. Tr. pp. 975, 1166; A. pp. 34-35.]

Also that next morning Hayton talked to his partner, Erwin Sprengel, his investigator, Robert Peach, and an attorney, Robert Beloud, after which he went to New York with his daughter Terry for about three weeks to attend the NACCA convention. He had planned to go before that date. [Rep. Tr. pp. 1159-60, 1220, 975; A. pp. 90-91, 34-35.] Hayton had his phone disconnected while he was gone and a new unlisted number installed. When Hayton returned from New York, he went on vacation with his children to the beach and on the boat to Catalina. *While he was gone, petitioner did not telephone Hayton's home. When Hayton returned, the telephone calls from petitioner resumed.* On one

occasion a female voice that Wenche Berg did not recognize called and talked with the children, and afterwards Wenche told the children that they should not have talked with petitioner because Hayton had forbidden it. Another time petitioner called and talked to Terry, Hayton's daughter, and told her that she was coming over because her daughter Debra wanted to see her and they would take her out for dinner. Hayton was consulted by telephone and the children were sent to a neighbor's house. *Later petitioner appeared at the house.* Hayton returned to his office the first week in September. [Rep. Tr. pp. 975, 1000-02, 1160-61; A. pp. 34-35, 40-41, 90-92.]

Hayton took his daughter Terry over to petitioner's house on the way to driving her to Rio Linda for enrollment at a school during the first part of September, so that she could say goodbye to Debra Miller. This was the day after petitioner had come to the house to see Terry and Hayton had instructed Wenche to hide the children. Hayton remained in the car when petitioner came out of the house. That was the last time Hayton saw her. [Rep. Tr. pp. 1002, 1161-62; A. pp. 41, 90-92.]

On July 31, 1964, two days after petitioner had spoken to Hayton at his home, she telephoned Erwin Sprengel and talked for almost an hour about Hayton and about a letter she had received from him. Sprengel made a tape recording of that conversation. [Ex. 45.] The conversation was transcribed. [Ex. 46.] In that conversation petitioner urged Sprengle to get Hayton to talk to her, as she knew, "If he talked to me, we could straighten it out," referring to his "hate" for her. She said that Hayton would "weaken" if he saw

her and that "He feels like I am a threat to his stubbornness." Although she told Sprengle that Hayton's emotional entanglement with her was over after the boat incident and after she went back to her husband, her entire conversation with Sprengle indicates that she still wished such entanglement. The entire conversation is fully set forth in the Appendix to the Brief for Respondent at pp. 7-26. [Rep. Tr. pp. 858-880.]

In the latter part of August of 1964, petitioner had a telephone conversation with Marilyn Sprengel, the wife of Erwin Sprengel, concerning petitioner's relationship with Hayton. In that conversation, petitioner told Mrs. Sprengel, in regard to that relationship, that petitioner was holding the trump card. [Rep. Tr. pp. 923-25; A. pp. 26-27.]

On September 22, 1964, Mrs. Sprengel had another conversation with petitioner on the telephone wherein petitioner asked her if she would be home that afternoon, inasmuch as she had a letter she wanted to show her. Later that afternoon, petitioner came over and showed a letter to Mrs. Sprengel. *Petitioner told Mrs. Sprengel that under certain circumstances, she would have copies made of the letter and give them to various* individuals, but if she married Hayton she *would destroy the letter. Petitioner told Mrs. Sprengel that in spite of the things that had recently taken place, that she still loved Hayton; that this was not the sort of thing that you could just turn off.* Mrs. Sprengel believed that during the same conversation, petitioner also said that she would never marry Hayton because he was no good. In the middle of September, petitioner told Mrs. Sprengel that Dr. Miller had threatened to commit suicide by driving his car to the mountains and

driving off a cliff. [Rep. Tr. pp. 930-36; A. pp. 27-29.]

On September 30, 1964, Roy Lyle James, a college instructor, was in the vicinity of the Allen Family shoe store in Montclair with Allen and Lorraine Habekost. At that time, petitioner was also present and brought up the subject of autopsies. She asked, "if a coroner's investigation produced a given statement, is it possible that that statement when entered on the autopsy report could have been changed?" [Rep. Tr. pp. 1954-55, 1966-67.]

Sergeant William Paterson was present when petitioner was arrested at her home at 1:30 p.m. on October 8, 1964. At that time he advised her of her rights. He told her that she did not have to talk with them if she did not want to; that she could remain silent and that she had a right to consult with an attorney before she talked with them. She was brought to the County Jail and booked. Afterwards, she was permitted to talk with Mr. Ward, her attorney, for at least ten minutes. Paterson examined petitioner's purse and wallet. Inside the purse he found a business card of Arthwell C. Hayton, and two place cards with Christmas decorations on them, one with the name Arthwell and the other with the name Lucille. [Ex. 47; Rep. Tr. pp. 1017-19; A. pp. 48-50.]

At 3:00 p.m. that afternoon, Donna M. Carter of the San Bernardino County Jail, women's division, booked petitioner into the jail. Petitioner complained of no injuries, although they did have some conversation. Carter saw no injuries on petitioner, and took a photograph of petitioner at 7:00 p.m. [Ex. 34.] Carter noticed that petitioner had little or no eyelashes. She saw

nothing noticeable about petitioner's hair. She did not recall any odor of burnt hair. Petitioner did not appear to be distraught at all. [Rep. Tr. pp. 685-88.]

On October 8, 1964, Anthony Longhetti, the criminalist for the San Bernardino County Sheriff, made a microscopic examination of the hair specimen taken from petitioner's head on that date and determined that at least twenty of the head hairs showed swiveling and beaded ends characteristic of singed hair. On October 11, between 6 and 7 p.m., he examined the hair on petitioner's right forearm and hand, and found some singed hairs on the outer aspect of the right arm about two inches behind the wrist. No other singed hair was noted either on the right arm or hand, or on the left arm or hand. [Rep. Tr. pp. 143-46.]

On October 21, 1964, Longhetti received from Edward P. Foley, defense counsel, a bag of clothing worn by petitioner on the night of the death of Dr. Miller consisting of a pair of capries, a blouse and a pair of yellow sandals. Examination and tests of the clothing revealed no evidence showing burning, singeing or petroleum derivatives. [Rep. Tr. pp. 146-51.]

Petitioner's Statements.

Around 9:00 p.m. on the night of petitioner's arrest, Sergeant William Paterson had a conversation with her in the County Jail. He advised her that she did not have to talk to him if she did not want to; that she could remain silent; that she had a right to consult an attorney before making a statement to him. He reminded her that she had been conferring with attorneys, and that if she wished to follow their wishes, it would be all right, for she did not have to talk to

him if she did not wish to do so. Petitioner said that she would rather talk to him than be in the jail section. [Rep. Tr. p. 1020.]

Paterson asked petitioner what were her activities on the evening in question. Petitioner said that she had left the house earlier in the evening to go downtown. It was about 7:30. She and Dr. Miller had an accident on the way in which their vehicle struck a dog. They stopped and checked for the ownership of the dog, and then proceeded on downtown. They went to a serve-yourself dry cleaning establishment. While waiting for their clothing, Dr. Miller went into a liquor store and purchased a coke, then returned to the car. They picked up their cleaning about 9:00 p.m. and returned home. About 11:00 p.m. she and Dr. Miller lay on the couch and watched a movie about spies and investigators. After the movie was over, Dr. Miller asked for some hot chocolate. She looked in the refrigerator and told Dr. Miller that there was not enough milk for both him and the children's breakfast in the morning. Dr. Miller said, "Let's go get some." They went down to a market that remained open until midnight, but arrived a couple of minutes after midnight and the market had already closed. She saw two men standing inside by the cash register, one wearing a white shirt. They went on down to the Mayfair Market where she purchased two one-half gallon cartons of milk for 96 cents, using a one dollar bill. She returned to the car and drove up Sapphire, making a right turn on Banyan. After traveling about a third or quarter way down Banyan, east of Sapphire, something went wrong with the steering, or she had a blow-out. She steered the car to the side of the road and it went into a bank.

Dr. Miller was wrapped in a blanket with his head against the window on a pillow. She had thought that when the car went into the bank, he hit his head. He said something like "Oh." She recalled an orange-red flame behind Dr. Miller from the floor up to the roof of the car. She became frightened and jumped out. She ran around to the right side of the vehicle and tried to open the door, but it was locked. She picked up a rock and threw it through the right rear window and then found a stick with which she tried to push Dr. Miller out of the vehicle. Paterson asked her why she was trying to push him out of the closed door, and she didn't answer. She went looking for help, traveling east on Banyan, and saying to herself, "No one will help me." After going on Banyan for a distance, she recalled that there was a house on Sapphire, and she went there. She remembered a dog barking and a woman coming to the door. Paterson asked her if she had any conversation with the woman, and she said: "You will have to talk with the woman, that she made all the phone calls." She said that her hair had been singed and that a white bandana she was wearing also had been burned. [Rep. Tr. pp. 1020-24.]

When Paterson had brought petitioner to the County Jail on that afternoon, she said that she threw the rock through the right rear window. She also brought up the subject of the autopsy by asking if there was enough left to perform an autopsy. When Paterson told her that there was, she said that the autopsy results would be in her favor. She said it repeatedly. [Rep. Tr. p. 1872.] After finishing the conversation that commenced around 9:00 p.m. on the night of petitioner's arrest, Paterson took petitioner to the interview room of

the Sheriff's Office and tape recorded another statement. [Ex. 48.] Again, petitioner said that she would rather talk with Paterson than be upstairs. The entire tape was played for the jury. [Rep. Tr. pp. 1030-78.]

In that conversation petitioner said, "Okay. You'll check me out, to see if my story is straight." [Rep. Tr. p. 1030.] She told Sergeant Paterson that she and Dr. Miller were going to have some hot chocolate but that they were out of milk and he suggested that they go get some. She told Sergeant Paterson that Dr. Miller had said that he was dizzy but that she did not know if Dr. Miller had taken any medicine. She said that there was no Psychopal (PAC) in the house but that they did have Fiorinal. [Rep. Tr. pp. 1033-35.] She told Sergeant Paterson how her attorney friend, Harold Lance, had been telling her that the authorities were suspicious about Dr. Miller's death and among other things she said:

> "But I said, I said to Harold, I said, and I asked him, I hounded him. He really didn't want to tell me, you know, Lance had no idea—even how they pinned this thing on me, or even tried to, and he didn't want to talk about it, you know, I badgered him, I said, please tell me some of the things that they come up with to make me look guilty in this, and he said, well, he said, you know, Cork could have been dead before that fire burned, and I said, 'Well, they can tell, the time of death,' and he said I don't think they can and I said, well, how would I have done it, and he said well, they were looking for, you know—a blow on the head or a bullet, and I said, 'Well, Harold, as I said, that autopsy will be completely in my favor,' . . ." [Rep. Tr. pp. 1056-58; A. p. 50.]

She told Sergeant Paterson that she had known Hayton about a year and had gone with him approximately six months prior to August. She told him that she did not love her husband but certainly had something for him. She said, "I felt like Cork was rejecting me for years." She said that they were married 15 years and that she was rejected for 14 of them. She said that her husband had lived with the knowledge of her relationship with Hayton for years. [Rep. Tr. pp. 1058-61; A. pp. 50-53.] She told Sergeant Paterson, "[B]asically, I've always kind of just lived my life the way I wanted to, and if you don't like it, you can take off." [Rep. Tr. p. 1066.]

She told Paterson that Dr. Miller had over $100,000 in life insurance because some of it was double indemnity. [Rep. Tr. pp. 1070-71; A. pp. 53-54.]

In rebuttal, Sergeant Paterson testified that on one of the evenings during the trial he drove up to the scene of the Miller Volkswagen fire with Inspector Precy Sellas. He said there was a full moon and he drove using just his parking lights. They did not light up the road ahead. It was extremely hazardous driving up 19th to Sapphire and to Banyan. He was constantly fighting the wheel to keep the car on the road itself. It was extremely dark on Sapphire though less so on Banyan. Yet on Banyan it was still dark enough to cause concern. There were no street lights on Sapphire or Banyan. [Rep. Tr. pp. 1868-69.] At that time he took some photographs of Donna Carter down below the retaining wall [Exs. 53, 54, 55], and on the other side of the street. She was about petitioner's size. [Rep. Tr. pp. 1870-71.]

On October 9, 1964, Peggy Fisk was booked into the County Jail as a prisoner. However, she was employed by San Bernardino County to work under cover and pretend to be a prisoner. Her instructions were only to listen. She was placed in petitioner's cell and became acquainted with her. Petitioner talked to her about herself, her reason for being in jail, her husband, and her domestic problems. [Rep. Tr. pp. 1098-99, 1102, 1112; A. pp. 54-55, 58, 66.] Fisk did not tell petitioner that she was a law enforcement agent, but did tell her that she should discuss these things with her attorney. She did not tell petitioner that she had a right to have an attorney present when she talked to Fisk. [Rep. Tr. p. 1100; A. p. 56.] Petitioner told Fisk that she and her husband had filed for divorce at one time but had reconciled before his death. She said that she had not loved her husband but that she had respected him. She said that she had always loved Mr. Hayton and still loved him. She said that as soon as this mess was over that she planned to take her daughter Debbie and the two boys away to Europe with the insurance money. She said that she would receive over a hundred thousand dollars in insurance because of the accidental death. [Rep. Tr. pp. 1100-1101; A. pp. 56-57.]

Fisk was not sure as to the date that she was released from the county jail but it was not later than October 15, 1964. [Rep. Tr. p. 1103; A. p. 59.] From time to time she made oral reports of what she heard to vice officer Lieutenant Shepherd who came to see her. She made no written notes. Her conversations with petitioner were not tape recorded or bugged in any way. She made no written report of the statements of pe-

titioner. A written report of Petitioner's statements based upon Fisk's oral reports was prepared by a secretary of the vice section on October 12, 1964 and partly on October 14, 1964. [Rep. Tr. pp. 1103, 1108, 1111, 1113; A. pp. 59, 63, 66-67.] The record is devoid of a single instance in which Fisk asked petitioner a question or said anything to her which induced any of the statements introduced into evidence. Nor does the record show that any of the statements were made after October 12, 1964. [Rep. Tr. p. 1098-1114; A. pp. 54-68.]

On October 13, 1964, a complaint charging petitioner with murder was filed in the Municipal Court of San Bernardino Judicial District, County of San Bernardino, State of California. Petitioner was arraigned on that date and a preliminary hearing was set for October 23, 1964. (Appendix.) On October 20, 1964, an indictment charging petitioner with murder was filed in the Superior Court of the State of California. [Clk. Tr. pp. 1-2.] On October 21, 1964, the complaint in the Municipal Court was dismissed. (Appendix.)

DEFENSE.

Petitioner denied all guilt. She explained her obtaining the barbiturate pills as necessary for her husband's illness. She recounted the details of the night in question. About 7:30 p.m. the doctor drove petitioner in the Volkswagen intending to go to a dry cleaners in Pomona. In route, their car killed a large German Shepherd dog and damaged the left front light of the car. The accident upset the doctor because this was the third car of his that had been damaged in four months. Nevertheless, he drove to the hobby shop where peti-

tioner purchased glue for the boys' model toys. Then they went to the cleaners. He complained of a headache and asked petitioner to drive on the return home. At home, the doctor reclined on a couch and watched television with a pillow under his head and a blanket over him. Petitioner joined him under the blanket. When the movie was over, the doctor asked petitioner to fix him some hot chocolate. She discovered that there was only about one-eighth gallon of milk left in the refrigerator. She told the doctor that this would not be enough for breakfast if she used any of it for hot chocolate. He suggested that they drive to Woody's Market and get some. The doctor took the pillow and blanket to the Volkswagen, which the doctor had rented. They did not take her car a Mustang with air-conditioning. The doctor climbed into the right front passenger seat, wrapped the blanket around himself and leaned his head on the pillow against the window. Petitioner drove and, noticing that her husband was leaning against the door, reached over and locked it. Woody's Market was closed. They then decided to go to the Mayfair. This was a 20 mile round trip. Petitioner went into the market with her husband's wallet containing 70 to 100 dollars and brought out two half gallon cartons of milk, placing them on the floor of the rear passenger compartment of the Volkswagen. She placed the wallet under her leg and never saw it again. She did not notice the gasoline can. She was driving on Banyan at 30 to 40 miles an hour wearing dark tinted glasses. It was not the most direct route home nor the one the family used. When she felt the steering wheel pull, as in a blowout, she immediately pulled in the opposite direction. The car went out of

control and landed on the shoulder without the application of brakes. She remembered in a sort of subconscious way, wheels spinning, then a large flame behind her. She panicked and the next thing she knew she was standing outside the open door of the car which was in flames. There were too many flames and it was too hot to try to pull the doctor out the door. She ran around the car and tried to open the door on the passenger side. Then she remembered she had locked it. Her next thought was to get a rock and throw it through the window. She found one but could not dig it out of the sand. She found another and threw it through the front window. The heat was so intense that she could not get the door open. She went down the bank looking for a stake with which to push her husband out of the car but could not find one large enough. She found one too small but nevertheless she hurried with it back to the car. She doesn't know what she did with the stake, possibly she dropped it. She ran in the direction of a car passing the nearby corner. It kept going. She then remembered the home of Mrs. Bridge at that corner. The house was unlit and she couldn't find it. She turned and went running in another direction. As she passed the burning Volkswagen, she stopped and she saw her husband. He was black. She then saw the gasoline can. She ran to Mrs. Swenson's house some distance away. [Rep. Tr. pp. 1622-62, 1349-53, 1702-1769, 1359-60.]

Petitioner testified on cross-examination that she wanted to marry Hayton before the boat incident but after that she stopped. She was in love with Hayton and wanted to marry him when he called her on May 24, 1964 about his talk with his minister. [Rep. Tr.

pp. 1782-83; A. p. 101.] The affair started with Hayton in December of 1963. [Rep. Tr. p. 1784; A. p. 101.] During the end of the period when she was going with Hayton, she wanted to be unmarried to Dr. Miller. [Rep. Tr. p. 1786; A. p. 102.] There were times during the marriage when petitioner wanted to be unmarried to Dr. Miller. [Rep. Tr. p. 1787; A. p. 102.] Petitioner was still in love with Hayton until the death of Dr. Miller. [Rep. Tr. p. 1788; A. pp. 102-03.] Petitioner felt that Dr. Miller had rejected her for 14 of their 15 years of marriage. [Rep. Tr. p. 1790.]

Accidental fire theories were presented by the defense through expert testimony but these theories were contradicted by the prosecution's experts as being highly unprobable in view of the condition of the Volkswagen. [Rep. Tr. pp. 662, 671, 677-79, 1536-1603, 1805-1844, 1847-48, 1853, 1878-1888, 1899-1902, 1971-1972, 1974-1977, 1991-1993.]

SUMMARY OF ARGUMENT.

There was no violation of the constitutional rights to counsel and against self-incrimination in the introduction of petitioner's jail cell statement to the police undercover agent under the rules in *Massiah* and *Escobedo* because the statements were made prior to any formal charging pleading in a state court; there was a total absence of a process of interrogation lending itself to eliciting incriminating statements and petitioner was not denied a requested opportunity to consult with her lawyer. This is a claim that would be legitimate only if it could be shown by appropriate reference to the record that petitioner's statements were the product of a process of interrogation under the broader protection

of the *Miranda* case which due to the date of the instant trial is not herein applicable.

As the law stood at the time the undercover agent was placed in petitioner's jail cell, the law enforcement authorities had sufficient grounds for a good faith belief that there was a right to place an undercover agent in a jail cell for the purpose of overhearing petitioner's statements provided no attempt was made on the part of the undercover agent to elicit statements from petitioner. The undercover agent was specifically instructed only to listen to petitioner and the prosecuting attorney in good faith believed that the statements were admissible as having been voluntarily made in spontaneous form, without any attempt to elicit them.

Petitioner intentionally waived the right to complain about the introduction of her statements to the undercover agent when she did not object to the testimony in a deliberate attempt to both inject constitutional error in the case and to place before the jury, at a strategic time, testimony entirely consistent and in support of the defense. In California where the decision to waive objection to the introduction of statements of the accused can be shown by the record to be attributed to a tactical decision by trial counsel the stratagem will be deemed a waiver of the objection. The Federal courts will deny the defendant relief if the State courts refuse to entertain Federal claims on the merits or a defendant for a strategic and tactical reason deliberately bypasses State procedures.

The introduction into evidence of petitioner's cumulative statements under the circumstances of this was harmless in that it dod not result in the denial of a constitutional right basic to a fair trial and the evi-

dence introduced could not have contributed to the conviction. Although the lack of the assistance of counsel at certain stages of the prosecution must almost invariably deny a fair trial, for example, at the trial itself, at some forms of arraignment or on appeal, the secret or in-custody interrogation situation and identification confrontation situations do not invariably deny a fair trial in the absence of counsel. Nor does the lack of protection of the Fifth Amendment privilege against self-incrimination in the above situation, absent a coerced confession, invariably prevent a fair trial.

Coerced confessions are excluded from evidence because of a complex of values including the likelihood that the confession is untrue, the preservation of the individual's freedom of will and the abhorrence of society to the use of involuntary confessions. In the area of coerced confessions and the assistance of counsel both at the trial and on appeal the principle applied goes to the fairness of the trial—the very integrity of the fact finding process and averts the pure danger of convicting the innocent. The exclusionary rules of *Massiah, Escobedo* and *Miranda* guard against the possibility of unreliable statements in every instance of in-custody interrogations but encompass situations as in our case in which the danger is not necessarily as great as when the accused is subjected to overt and obvious coercion. Statements obtained in those circumstances may well be voluntary, highly reliable and relevant. Furthermore, the law on coerced confessions is available to persons as a safeguard.

The conclusion is reached that all petitioner attacks in this case is the admissibility of evidence, the reliability and relevancy of which is not questioned and which

had no effect on the outcome. Petitioner finds prejudice to her case in her admission to the undercover agent that she had not loved her husband but had respected him, that she had always loved Arthwell Hayton and still loved him because it made the prosecution's entire case seem credible. This statement was not a confession nor was it an admission that implicated her in crime. It was no more than a statement of fact that she had a motive to murder her husband to overcome the assumption that a woman loved her husband and would not murder him. In the posture of the defense that petitioner had indeed loved Arthwell Hayton and had an adulterous affair with him but no longer intended to marry him, the admission was of no consequence. The question was whether before the murder she had abandoned the idea of marrying Arthwell Hayton. The crucial point is that petitioner did not admit to the undercover agent that she intended to marry Hayton now that her husband was dead which was the only contested question on motive in issue at the trial. Under these circumstances the introduction into evidence of petitioner's unelicited pre-indictment admissions did not affect the outcome of the trial.

Under some circumstances, as in the present case, the introduction into evidence of statements obtained from a defendant while in custody may be harmless provided they are not confessions which are necessarily prejudicial. There is strong justification for treating involuntary confessions in a class by themselves and refusing to inquire whether in rare cases whether their admission into evidence had no bearing on the results. Almost invariably a confession will constitute persuasive evidence of guilt and it is therefore usually ex-

tremely difficult to determine what part it played in the securing of the conviction.

An admission such as the one in the instant case may be only a relatively insignificant part of the total evidence and have no effect on the outcome of the trial. The basic purpose of the exclusionary rule is to deter unconstitutional methods to law enforcement. A reversal for the admission of illegally obtained evidence without regard for prejudice when there is compelling legally obtained evidence of guilt constitutes nothing more than a penalty not for the officers illegal conduct in securing the evidence, but solely for the prosecutor's blunder in offering it in the trial court and the trial court's error in admitting it. The exclusionary rule so rigidly administered could defeat itself.

Judicial experience in California has shown that where a defendant's testimony or other evidence is virtually identical with extra-judicial statements of the defendant introduced into evidence and it is shown that the introduction of the extra-judicial statements as in the instant case played no part in causing the defendant to take the witness stand, no harm can be found in the introduction into evidence of the extra-judicial statement. It is then clear beyond a reasonable doubt that there is no possibility the evidence could have affected the outcome.

The compelling reasons for the prospective application of constitutional rules of criminal procedure are equally persuasive that a harmless error rule should be applied to any constitutional rule of criminal procedure that of necessity should be applied prospectively. In the area of in-custody interrogation compelling argument has resulted in the adoption of prospective ap-

plication of the *Escobedo* and *Miranda* rules and we submit that it logically follows that a harmless error rule be applied to those rules.

There will be no inordinate difficulty in the application of a harmless error rule to admissions for the burden to establish beyond a reasonable doubt that the admission of evidence could not have affected the outcome is upon the shoulders of the prosecution. Once that burden has been met the lack of prejudice will be self-evident. It is reasonable to distinguish between admissions and confessions for the purpose of determining harmless error because that is a factual distinction as to the extent of the incriminating effect of a statement. Entirely different considerations compel the denial of any distinction between admissions and confessions for the purpose of determining error.

At the time that petitioner made her jail cell statements to the undercover agent, the concept of *Massiah* and *Escobedo* were in their infancy and their implications were not clearly foreshadowed. Under these circumstances, there was no prosecutorial misconduct in the instant case. The application of the harmless error rule to the evidence of petitioner's jail cell statements will serve the useful purposes of that rule and will not impair the deterrent effect of the exclusionary rules of *Massiah* and *Escobedo*.

ARGUMENT.

I.

THERE WAS NO VIOLATION OF THE CONSTITUTIONAL RIGHTS TO COUNSEL AND AGAINST SELF-INCRIMINATION IN THE INTRODUCTION OF PETITIONER'S JAIL CELL STATEMENTS TO THE POLICE UNDERCOVER AGENT.

Petitioner contends that there can be no dispute about the unconstitutionality of the manner in which the undercover agent obtained petitioner's statements. She contends that the statements were obtained in violation of the rules set forth in the cases of *Massiah v. United States,* 377 U.S. 201 (1964), and the case of *Escobedo v. Illinois,* 378 U.S. 478 (1964). The record fails to establish that the undercover agent obtained statements from petitioner in violation of *Massiah* and *Escobedo.* Furthermore, petitioner intentionally waived the right to complain about the introduction of her statements when she did not object to the testimony in a deliberate attempt to both inject constitutional error in the case and to place before the jury, at a strategic time, testimony entirely consistent and in support of the defense. In any event, the testimony of the undercover agent was merely cumulative of evidence already properly admitted and conceded to be true both in her testimony and in the argument of counsel. The evidence was harmless beyond any reasonable doubt for it dealt in total with a subject that was not in issue between the prosecution and the defense *i.e.,* that petitioner was the beneficiary of life insurance on the life of her husband and loved a man other than her husband. In fact, the Fourth District Court of Appeal in effect held that it did not have the slightest idea that petitioner had been injured by the introduction of her statements to the undercover agent.

A. The Circumstances Surrounding the Acquisition and Introduction of Petitioner's Jail Cell Statements Demonstrates the Inapplicability of Massiah and Escobedo.

Petitioner was arrested at about 1:30 p.m. on October 8, 1964, the day of the homicide. At that time she was advised of her rights in that she was told that she did not have to talk to the police if she did not want to; that she could remain silent and that she had a right to consult with an attorney before she talked to the police. She was brought to the County Jail and booked. Afterwards she was permitted to talk with Mr. Ward, her attorney, for at least 10 minutes. [Rep. Tr. pp. 1017-1019; A. pp. 48-49.]

About 9:00 that evening, petitioner had a conversation with Sergeant William Paterson in the County Jail. He advised her that she did not have to talk to him if she did not want to; that she could remain silent; that she had a right to consult an attorney before making a statement to him. He reminded her that she had been conferring with attorneys, that if she wished to follow their wishes, it would be all right, for she did not have to talk to him if she did not wish to do so. Petitioner said that she would rather talk to him than be in the jail section. [Rep. Tr. p. 1020.]

On October 9, 1964, Peggy Fisk was booked into the County Jail as a prisoner, however, she was employed by San Bernardino County to work undercover and to pretend to be a prisoner. Her instructions were only to listen. [Rep. Tr. pp. 1102, 1112; A. pp. 58, 66.] She was placed in petitioner's cell and became acquainted with her. Petitioner talked to Peggy Fisk about herself, her reason for being in jail, her husband, and

her domestic problems. [Rep. Tr. pp. 1098-1099; A. p. 55.] Peggy Fisk did not tell petitioner that she was a law enforcement agent, but did tell her that she should discuss these things with her attorney. She did not tell petitioner that she had a right to have an attorney present when she talked to Peggy Fisk. [Rep. Tr. p. 1100; A. p. 56.] Petitioner told Peggy Fisk that she and her husband had filed for divorce at one time but had reconciled before his death. She said that she had not loved her husband but that she had respected him. She said that she had always loved Mr. Hayton and still loved him. She said that as soon as this mess was over that she planned to take her daughter Debbie and the two boys away to Europe with the insurance money. She said that she would receive over a $100,000 in insurance because of the accidental death. [Rep. Tr. pp. 1100-1101; A. pp. 56-57.]

Peggy Fisk was not sure as to the date she was released from the County Jail but it was not later than October 15, 1964. [Rep. Tr. p. 1103; A. p. 59.] From time to time she made oral reports of what she heard to Vice Officer Lieutenant Shepherd who came to see her. She made no written notes. Her conversations with petitioner were not tape recorded or bugged in any way. She made no written report of the statements of petitioner. A written report of petitioner's statements based upon Peggy Fisk's oral reports was prepared by a secretary of the Vice Section on October 12, 1964 and partly on October 14, 1964. [Rep. Tr. pp. 1103, 1108, 1111, 1113; A. pp. 58-59, 62-63, 65-67.] The record is devoid of a single instance in which Peggy Fisk asked petitioner a question or said anything to her which induced any of the statements introduced into

evidence. Nor does the record show that any of the statements were made after *October 12, 1964.* [Rep. Tr. pp. 1098-1114; A. pp. 55-68.]

On October 13, 1964, a complaint charging petitioner with murder was filed in the Municipal Court of San Bernardino Judicial District, County of San Bernardino, State of California. Petitioner was arraigned on that date and a preliminary hearing was set for October 23, 1964. (Appendix documents.) On October 20, 1964 an indictment charging petitioner with murder was filed in the Superior Court of the State of California. [Clk. Tr. pp. 1-2.] On October 21, 1964, the complaint in the Municipal Court was dismissed. (Appendix documents.)

Petitioner testified that she had a love affiar with Arthwell Hayton which started the first part of December, 1963. She had known him for some years before that time. [Rep. Tr. p. 1784; A. p. 101.] Toward the end of the affair petitioner wanted to be unmarried to her husband, the victim. [Rep. Tr. p. 1786; A. p. 102.] She had felt that way on occasion in the past. [Rep. Tr. p. 1787; A. p. 102.] She testified that she loved Arthwell Hayton up until the minute her husband was gone but that she had lost interest in marrying Arthwell Hayton at the time she had followed him when he had taken another woman to his boat. She testified that at the time of the trial she did not love Arthwell Hayton, which was logical after he had testified against her. [Rep. Tr. p. 1788; A. pp. 102-103.] Solely on the issue of motive and before the undercover agent took the witness stand the prosecution had already proved that petitioner's motive had been to get rid of her husband so that she could be free to marry

the man she loved. While she waited for him, she did not want to have money problems; thus the insurance proceeds, in excess of $100,000, were an additional motivating factor. The underlying motive for the murder was shown to be the fact that petitioner was a selfish and avaricious woman who had long before lost all love and interest in her husband and the life he had provided her. She wanted another man's love, money, social status, prestige, elegant surroundings, and association with wealthier people.

There had been testimony by Walter R. Nourse, the family accountant, that during 1964 the victim's income had been $15,299.76 after business expenses [Rep. Tr. p. 940; A. p. 31], and that in 1963 he had talked over insurance on the victim's life with petitioner. [Rep. Tr. p. 952; A. pp. 31-32.] There was testimony that petitioner told Erwin Sprengel, a business associate of Arthwell Hayton, that she disliked her husband and that if he interfered with her new house plans he would "get his." [Rep. Tr. pp. 829-830; A. pp. 3-5.] Sprengel testified that within three months of the murder petitioner told him that she had lost any affection whatsoever for her husband and instead loved Arthwell Hayton and wanted to marry him. [Rep. Tr. pp. 827-832; A. pp. 3-6.] Sprengel testified that after having filed for divorce and separated from her husband petitioner said that she resumed living with him only for the money he could earn. [Rep. Tr. pp. 832-833, 909; A. pp. 6-7, 26.] There was testimony that in late August, a little over a month before the murder, petitioner told Erwin Sprengel's wife Marilyn that she had the trump card over Arthwell Hayton in their relationship. [Rep. Tr. pp. 924-925; A. p. 26.] On Sep-

tember 22, 1964, two weeks before the murder, petitioner told Mrs. Sprengel that in spite of the things that had recently taken place, that she still loved Arthwell Hayton, and that this was not the sort of thing that you could just turn off. [Rep. Tr. pp. 930-935; App. pp. 26-29.]

There was testimony that petitioner told the investigating officer that she had gone with Arthwell Hayton about six months; that she had discussed this romance with her husband; that she did not love her husband; that he had rejected her for years; and that he had lived with the knowledge that she loved Arthwell Hayton. [Rep. Tr. pp. 1058-61; A. pp. 50-53.] She told that investigating officer that she knew her husband had over $100,000 in life insurance some of which was double indemnity and that she was the beneficiary. [Rep. Tr. pp. 1070-1071; A. pp. 53-54.]

After the brief testimony of the undercover agent to the effect that petitioner had not loved her husband but had respected him, that she had always loved the other man and still loved him, and that as soon as this mess was over that she planned to take her daughter Debby and the two boys away to Europe with the insurance money of over $100,000 because of the accidental death [Rep. Tr. pp. 1098-1101; A. pp. 54-57], there was further testimony on this subject from civilian witnesses. Harold J. Lance, petitioner's attorney, testified that she was the beneficiary of nearly $100,000 in life insurance on the victim's life much of which was double indemnity. [Rep. Tr. pp. 1194-1198; A. pp. 95-98.]

Arthwell Hayton, the other man, testified that earlier in the year she had told him that she had never loved

her husband, that her marriage was a mistake, and that she did not want to live with him anymore. Hayton was a lawyer. [Rep. Tr. pp. 1119-1120; A. pp. 68-69.] He testified on cross-examination by defense counsel that they carried on a motel affair, the last time having been three months before the murder. [Rep. Tr. pp. 1181-1182; 1207; A. pp. 92-94, 99.] He testified on direct examination by the prosecution that about six months before the murder she proposed marriage to him as soon as they could divorce their respective mates. [Rep. Tr. pp. 1121-25; A. pp. 69-73.] He testified that he declined to marry her but that she persisted in the months that followed (his wife having conveniently died a few days after petitioner's illicit proposal of marriage). [Rep. Tr. pp. 1125-1134, 971-979; A. pp. 32-35, 72-79.] Petitioner continued to pursue Hayton with loving attention and with assistance with his children in his time of grief. She did not deny to Hayton that she had told people that Hayton was going to marry her and move to her house. Her activities were noticed by the community; and Hayton, to preserve his reputation, decided to break with her. Petitioner was furious. The obstacle to her plan was an unwanted and unloved husband. Petitioner called Hayton's secretary to tell her to shut off the phone calls that were advising Hayton against her and she told the secretary that she intended to marry Hayton. When the secretary suggested then that Hayton did not care that much for her and was grieved over the death of his wife, petitioner said, "Time will tell," and that in the meantime the secretary should not get any ideas about Mr. Hayton. [Rep. Tr. pp. 971-972, 979; A. pp. 32-33, 35.] Petitioner had been involved in an automobile accident and asked Hayton, to take her case. She used this de-

vice to have him come over to her house, but he still refused to renew the affair. Petitioner waited for the community furor to calm down and then she asked Hayton to come to her. He again refused, but she bided her time and eventually he did come to her and he weakened to her charm on June 22, 1964, when they went to a Palm Springs motel and were intimate. [Rep. Tr. pp. 1130-1134, 1182-1183, 1215; A. pp. 76-79, 94, 100.] From this point on, it was clearly shown by petitioner's statements that she believed that if she could get Hayton to meet her, she could control him through sex. [Rep. Tr. pp. 858-866; A. pp. 10-16.] During this period after Hayton broke off the affair petitioner telephoned him constantly to establish contact, but he was either curt with her or would not talk to her at all. She maintained contact with him through his children and friends. She pumped their mutual friend, Erwin Sprengel, for information about him and asked Sprengel to take messages to him telling Sprengel that she loved and wanted to marry Hayton. [Rep. Tr. pp. 827-32; A. pp. 3-6.]

Petitioner filed for divorce July 8, 1964. Hayton began to show interest in other women, and petitioner's reaction was outrage and foolish retribution when she followed Hayton when he was on a date with another woman and tried to wreck his boat with him and his date aboard. It gave her an opportunity to once again get close to him when she waited outside his home for him to return from the date. At that time she expressed her jealousy and the intention to never be cast aside by him. She revealed her vicious capabilities by threatening to expose him to public ridicule through the disclosure of his immorality. [Rep. Tr. pp. 983-988, 1134-1135, 1217; App. pp. 35-38, 79, 100.]

Toward the end of July, a little over two months before the murder, when the friction between Hayton and petitioner had had a chance to cool down, she once again approached him with repentance and sweetness on the telephone. When this tack was unavailing and she was again rejected, she became furious and resorted to the most vile of threats to expose Hayton to the community. [Rep. Tr. pp. 1147-1158, 984; A. pp. 35-36, 86-90.] Petitioner attempted to have further blackmail threats passed to Hayton through Sprengel when she revealed a tape recording she had made in Hayton's Cadillac on one of their clandestine dates and other "incriminating" evidence, as well as the threat of an outraged husband's vengance. She told Sprengel that she did not want Hayton to hate her, and that if she could talk to him she could soothe him and he would weaken. [Rep. Tr. pp. 853-879; A. pp. 9-26.]

In light of this damning evidence on the issue of motive to be rid of her husband, the brief direct testimony of the undercover agent, occupying one page of the Reporter's Transcript, pales and is placed in its proper perspective in the case. The testimony was of minor significance on a matter that was not even in issue in the case. The issue was not whether petitioner loved Arthwell Hayton but whether she had an interest in marrying him at the time that her husband died. Her emotional entanglement with Hayton was admitted and utilized by the defense in argument to demonstrate her innocence not her guilt. [Rep. Tr. pp. 2174, 2176, 2181-2185, 2238-2239, 2243-2245; A. pp. 121-131.]

Defense counsel argued that appellant had an adulterous affair with Arthwell Hayton and was in love with him up until the time of her husband's death.

It was argued that at the time of her husband's death petitioner had lost any interest in a marriage with Arthwell Hayton, however. Defense counsel used all of the statements made by petitioner both to her friends and to the police including the statements made to the undercover agent to support the argument that the love affair with Arthwell Hayton had reached its logical conclusion when petitioner returned to her husband and gave up the idea of marriage. He emphasized the undercover agent's testimony that Lucille respected her husband and the investigating officer's testimony that petitioner had some feeling for her husband. The defense emphasized that the police had played a game of "dirty pool" in placing the undercover agent in petitioner's jail cell, and concluded:

> "Well, I don't know how many others they have had up there from October the 8th right up until this trial listening and to report on anything she said, but his [*sic*] much we know, no matter how many they have, they haven't got a single thing incriminating against Lucille Miller. They have absolutely no admission no confession of any kind, and they'll never have because Lucille Miller is innocent." [Rep. Tr. p. 2245; A. p. 130.]

The defense also acknowledged that petitioner was aware of the life insurance on her husband's life. [Rep. Tr. pp. 2238-2239; A. pp. 127-128.]

It is abundantly clear beyond any reasonable doubt that the testimony was entirely cumulative and material only as to an issue virtually uncontested by the defense. The evidence was necessarily harmless beyond a reasonable doubt.

B. There Was No Deliberate Elicitation of Statements From Petitioner After a Formal Charging Pleading Had Been Filed.

There was no violation of the rules of the *Massiah* and *Escobedo* cases in the acquisition of petitioner's jail cell statements because the statements were made prior to any formal charging pleading in the State court. There was a total absence of a process of interrogation lending itself to eliciting incriminating statements and petitioner was not denied a requested opportunity to consult with her lawyer. Petitioner had consulted with her attorney and had disregarded his advice when she spoke to Sergeant Paterson. Petitioner is obviously aware of this defect in her contentions because she has attempted to combine the necessary requisites for the applicability of the *Massiah* and *Escobedo* decisions. To get around the requirement of an accusatory pleading having been filed as to the *Massiah* rule petitioner relies on *Escobedo.* To avoid the requirement in *Escobedo* that there be a process of interrogation and a denial of a requested opportunity to consult with a lawyer, petitioner relies upon the indirect and surreptitious interrogation in *Massiah.* Petitioner must claim under *Massiah* or *Escobedo.* She has no federal claim under combination of the two cases because of the January 1965 date of trial. Her claim would be legitimate only if she could show, by appropriate reference to the record, that her statements were the product of a process of interrogation under the broader protection of *Miranda v. Arizona,* 384 U.S. 436 (1966), but *Miranda* is not available to this petitioner in that this case was tried prior to June 13, 1966. *Johnson v. New Jersey,* 384 U.S. 719 (1966). No such showing has been made.

It was held in *Massiah* that the defendant is entitled to a lawyer's help after he has been indicted and that a defendant is denied the basic protections of the specific guarantee of the Sixth Amendment right to counsel, when there is used against him at his trial evidence of his own incriminating words *deliberately elicited* from him by the government *after he has been indicted* and in the absence of his counsel.

In *Escobedo* it was held that where the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out *a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer,* and the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied the right to counsel. These cases were adopted and extended in California. *People v. Dorado,* 62 Cal. 2d 338 (1965). In *People v. Arguello,* 63 Cal. 2d 566 (1965), California specifically applied the *Massiah* rule. In that case the defendant was indicted and an attorney appointed to represent him. Thereafter, an undercover narcotic agent for the State of California was incarcerated on a fictitious charge following discussions with the prosecutor, as a pretense to enter the jail cell where the defendant was held. The undercover agent deliberately elicited statements from the defendant. And since one of the statements was tantamount to a confession the California Supreme Court held that the introduction of the statement was reversible error based upon California Constitution, Article 6, section 4½, *Fahy v.*

Connecticut, 375 U.S. 85, 86-87. *Dorado* was decided on January 29, 1965 and *Arguello* was decided in November of 1965, 14 months after Peggy Fisk had been placed in petitioner's jail cell.

In 1963, the California Supreme Court had decided *People v. Lopez,* 60 Cal. 2d 223, 247-248. In that case an undercover agent was purposely placed in a jail cell in order to obtain statements from the defendant. Relying upon *Lopez v. United States,* 373 U.S. 427 (1963), the court held that there was no violation of due process in placing the undercover agent in the jail cell with the defendant or in permitting him to testify as to his conversations with the defendant. The court said:

> "When either physical or psychological coercion is present, the admissibility of a defendant's admission or confession (insofar as the federal Constitution is concerned) is determined by inquiring 'whether the behavior of the State's law enforcement officials was such as to overbear petitioner's will to resist and bring about confessions not freely self-determined—a question to be answered with complete disregard of whether or not petitioner in fact spoke the truth.' (Rodgers v. Richmond (1960) 365 U.S. 534, 544 [81 S.Ct. 735, 5 L.Ed.2d 760, 768]; see also People v. Ketchel (1963) 59 Cal.2d 503, 519-522 [7] [30 Cal.Rptr. 538, 381 P.2d 394].) In this case there was no behavior by the State's law enforcement officers that overbore defendant's will to resist nor is there any indication that his admissions were anything but 'freely self-determined.' (Rodgers v. Richmond (1960) supra, at p. 544 of 365 U.S. [5 L.Ed.2d at p. 768].) Moreover, there is shown no mental or physical

coercion; no invasion of privacy; and no inducement by Luna that caused the subject statements to be made by Lopez. In the absence of such factors, a declarant assumes the risk that the person to whom he makes damaging statements may repeat those statements in court to be used against the declarant. (Lopez v. United States (1963) 373 U.S. 427, 438-439 [83 S.Ct. 1381, 10 L.Ed.2d 462, 470, 477].) There was no violation of due process in placing Luna in the Bakersfield jail cell with Lopez or in permitting Luna to testify as to his conversations with Lopez. Except only insofar as concerns consultation with his attorney in a room designated for that purpose, a prisoner has no right of privacy in a jail. (People v. Morgan (1961) 197 Cal.App.2d 90, 93 [3] [16 Cal.Rptr. 838], cert. de. 370 U.S. 965 [82 S.Ct. 1606, 8 L.Ed.2d 830].)"

People v. Lopez, supra, 60 Cal. 2d 223, 248.

In the recent case of *Katz v. United States,* 389 U.S 347, 351 (1967), it was held that what a person knowingly exposes to the public even in his own house or office, is not a subject of Fourth Amendment protection. Mr. Justice White in his concurring opinion said at 363:

"In previous cases, which are undisturbed by today's decision, the Court has upheld, as reasonable under the Fourth Amendment, admission at trial of evidence obtained (1) by an undercover police agent to whom a defendant speaks without knowledge that he is in the employe of the police, *Hoffa v. United States,* 385 U.S. 293 (1966); (2) by a recording device hidden on the person of such an

informant, *Lopez v. United States,* 373 U.S. 427 (1963); *Osborn v. United States,* 385 U.S. 323 (1966); and (3) by a policeman listening to the secret micro-wave transmissions of an agent conversing with th edefendant in another location, *On Lee v. United States,* 343 U.S. 747 (1952). When one man speaks to another he takes all the risks ordinarily inherent in so doing, including the risk that the man to whom he speaks will make public what he has heard. The Fourth Amendment does not protect against unreliable (or law-abiding) associates. *Hoffa v. United States, supra.* It is but a logical and reasonable extension of this principle that a man take the risk that his hearer, free to memorize what he hears for later verbatim repetitions, is instead recording it or transmitting it to another. The present case deals with an entirely different situation, for as the Court emphasizes the petitioner 'sought to exclude . . . the uninvited ear,' and spoke under circumstances in which a reasonable person would assume that uninvited ears were not listening."

Following the decision in *Escobedo* and *Dorado,* it was held that as long as incriminating statements are not elicited by a process of interrogation, the information obtained by an undercover agent placed in a jail cell to overhear incriminating statements on the part of an accused, is admissible and does not violate the rule of *Escobedo* and *Dorado. People v. Sipult,* 234 Cal. App. 2d 862; *People v. Sogoian,* 232 Cal. App. 2d 430, 434; *People v. Ross,* 236 Cal. App. 2d 364, 370-372.

It was held in *Miranda v. Arizona, supra,* 384 U.S. 436, 478 (1966) that in dealing with statements ob-

tained through an interrogation the court did not purport to find all confessions inadmissible. Confessions remain a proper element in law enforcement. Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence. Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility was not affected by the holding.

It is clear from the above cases that as the law stood at the time Peggy Fisk was placed in petitioner's jail cell the Sheriff had sufficient grounds for a good faith belief that he had a right to place an undercover agent in that jail cell for the purpose of overhearing petitioner's statements provided no attempt was made on the part of the undercover agent to elicit statements from petitioner. The undercover agent was specifically instructed only to listen to petitioner. [Rep. Tr. pp. 1102, 1112; A. pp. 58, 66.] The prosecuting attorney in good faith believed that the statements were admissible for he argued to the trial court at the time he offered the evidence that the witness had not interrogated petitioner but instead had told her to talk to her attorney and that he had been informed by the witness that all she did was listen. [Rep. Tr. pp. 1010-1013; A. pp. 43-45.]

The record does not support petitioner's contention that her statements were deliberately elicited by the undercover agent as a result of a surreptitious process of interrogation. On the contrary, there was no process of interrogation undertaken by the undercover agent and the statements were entirely spontaneous on the part of petitioner.

In the cross-examination of Peggy Fisk, defense counsel developed the fact that she had been instructed by the Sheriff to bring a newspaper article and two fictitious conversations to the attention of petitioner which might be deemed elicitory; however, it was never shown that any statements by petitioner resulted and none were placed in evidence. It is only when incriminating statements are used as evidence against a defendant that there is a constitutional violation. *Massiah v. United States, supra,* 377 U.S. 201, 207 (1964). This particular conduct by the undercover agent was not proper, however, the record does not show any relationship between this improper conduct and the particular statements of petitioner that were introduced into evidence. It was this conduct which the District Court of Appeal condemned but found that it had not injured petitioner. *People v. Miller, supra,* 245 Cal. App. 2d 112, 144. This is true because no product of this improper conduct was introduced into evidence.

The contention of petitioner in the absence of a record showing that her statements were obtained after an accusatory pleading was filed and as the result of a process of interrogation after the denial of requested counsel is clearly subject to the rule that this Honorable Court will not review questions not clearly raised on the record. *Standard-Vacuum Oil Company v. United States,* 339 U.S. 157, 160 (1949). On this record the circumstances of this case preclude any conclusion that the statements of petitioner made in the presence of the undercover agent fall within the exclusionary rules of the *Massiah* and *Escobedo* decisions.

C. The Jail Statements Were Introduced Without Any Objection by the Defense Which Deliberately Allowed the Evidence as Part of Its Strategy.

It is the present law in the State of California that on appeal the issue of denial of counsel during interrogation, after the enunciation of the rules in *Massiah, Escobedo* and *Dorado,* must be based upon an objection taken in the court below. *People v. Hillery,* 62 Cal. 2d 692, 711-712; *People v. Doherty,* 67 A.C. 1, 6-7. The California cases place emphasis on the fact that the decision to waive objection to the introduction of statements of the accused can be attributed to a tactical decision by trial counsel.

In *Doherty* it was held:

> "In the absence of special circumstances justifying an inference of knowing and intelligent waiver of an Escobedo-Dorado claim, we cannot assume such a waiver in a trial held before January 29, 1965."[1]

But stated in that opinion:

> "We recognize that defense counsel in a trial held prior to January 29, 1965, might have deliberately developed on *voir dire* facts which would support the exclusion of the statements under the Escobedo-Dorado rule, yet omitted to object to their introduction in the hope that upon subsequent appeal the showing would serve to reverse. (Compare the facts in People v. Brown (1965) 238 Cal.App.2d 924, 928 [48 Cal.Rptr. 204].) Such a

[1] *People v. Dorado,* 62 Cal. 2d 338, was decided on January 29, 1965. The language in our case which merely required absence of an objection in order to find a waiver was disapproved.

tactical maneuver should not generate a valid basis for reversal. If the People should sustain the burden of establishing the fact of such tactics, we would treat defendant's stratagem as a waiver of the objection."

The decision therefore established that in California in order to find a waiver of the *Escobedo-Dorado* rule benefit an appellate court must find special circumstances justifying an inference of knowing and intelligent waiver of those benefits, such as the tactic of asking questions directed toward the foundation of such an objection but a failure to actually make the objection. The facts of this case certainly justify such a waiver although the trial commenced a few days before January 29, 1965. In circumstances not unlike those in the present case the California Court of Appeal in the very recent case of *In re Woods,* 256 A.C.A. 837, 841-842 found a deliberate waiver of objection on an *Escobedo-Dorado* claim.

As pointed out above, the tactics of counsel in the instant case were obvious. Except for the portion of Peggy Fisk's testimony which was introduced by the prosecution the remainder of her testimony was favorable to the defense, for it brought out that petitioner had stoutly maintained her innocence and told identically the same story to which she later testified. Defense counsel had received a copy of the undercover agent's reports to her superiors concerning her talks with petitioner, and it is reasonable to assume that defense counsel was willing to have the undercover agent testify to show the extremes to which the sheriff went to try to convict her and to show that her story of innocence had never varied. Indeed, as pointed out above, de-

fense counsel in argument utilized the undercover agent's testimony for both these purposes.

The Federal courts will deny a defendant relief if the State Courts refuse to entertain Federal claims on the merits or a defendant for a strategic and tactical reason deliberately bypasses State procedures. *Fay v. Noia*, 372 U.S. 391, 439 (1963).

When the undercover agent was called to the stand as a witness for the prosecution, petitioner's counsel raised an objection that he had not been furnished with the witness's address as promised. At the suggestion of the court, proceedings were then continued in the Judge's chambers outside the hearing of the jury. [Rep. Tr. pp. 1007-1008; A. pp. 41-42.] Once in chambers counsel for petitioner said [Rep. Tr. p. 1009; A. pp. 42-43]:

> ". . . I am going to represent to the Court also that any testimony of this witness concerning any statement made by my client would be in violation of the rule in the Dorado case.[2] She was an undercover agent, and never informed my client of her capacity. Never advised my client of my client's right to remain silent.
>
> "I previously had served on the District Attorney and the Sheriff of this County a demand to be present at any interrogation of my client by any agent of the Sheriff's office. So, any testimony of this witness concerning any statement made by my client not only violates the rule in the Dorado case, but the rule in People v. Sharer as well, and also the rule in Massiah versus United States."

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[2](Footnote ours.) *People v. Dorado*, 62 Cal. 2d 338, had originally been decided on August 31, 1964 but a rehearing had been granted on September 24, 1964.

The district attorney offered counsel for the defense the opportunity to interview the witness, and counsel took advantage of that opportunity. [Rep. Tr. pp. 1009-1010; A. pp. 42-43.] The District Attorney stated [Rep. Tr. pp. 1010-1012; A. pp. 43-45]:

> "Now, so far as the rest of it, the right under the Dorado case and Massiah case and the rest of them, the right of a witness, a defendant to remain silent. It is a defendant's right, not an attorney's. The defendant may waive this right, providing the defendant does so intelligently, knowingly and understandingly. This is the gist of all of those cases.
>
> "Now, this particular witness did not interrogate his client. She specifically told her, the testimony will be that she specifically advised Mrs. Miller not to talk. Her testimony will be that Mrs. Miller told her that her attorneys had advised her that there probably would be somebody in jail trying to pump her, and Miss Fisk, as part of her technique, I suppose, told Mrs. Miller: 'Well you shouldn't talk to anybody except your attorneys and the sheriff,' and, of course, she never did talk to the Sheriff, so that is beside the point.
>
> "She stayed up in the jail with her for about a week and listened and when Mrs. Miller talked to her, on two or three occasions, she told her 'Don't tell me about it.' But Mrs. Miller insisted on telling her. It is Mrs. Miller's right and privilege to talk, if she wants to.
>
> "Nobody pumped her. Nobody interrogated her No attempt was made to force her to talk at all. She did talk, and some statements which she made

which are material to this case, we will desire to have her testify about them, and statements in the report which Mr. Foley saw last December."

The trial court suggested that the prosecution withdraw the witness and gave counsel an opportunity to talk to her, but that on the other objection she would have to be sworn in and at least testify to the preliminary questions and have an objection made at the proper time. [Rep. Tr. pp. 1013-1015, A. pp. 45-47.]

The following morning the undercover agent was the first witness. She was called to the witness stand and asked preliminary questions as to her occupation and the fact of her undercover placement in petitioner's jail cell. The District Attorney asked her if petitioner had talked about herself, the reason she was in jail, about her husband, and about any domestic problems she had had. At that point petitioner's counsel asked to take the witness on *voir dire,* at which time he asked if she had informed the petitioner that she was a law enforcement agent, of her right to remain silent, and of her right to have an attorney present. The witness testified that she told appellant that she should discuss this with her attorney. Counsel for petitioner closed his *voir dire* examination and the direct examination was resumed. *Counsel for petitioner did not interpose any objection whatsoever to the testimony of the undercover agent. Nor did he attempt to lay any foundation that there had been a process of interrogation that lent itself to eliciting incriminating statements.* He was entirely cognizant of the *Massiah, Escobedo,* and *Dorado* decisions for he had raised the point in chambers before the undercover agent was called as a witness. He took the witness on *voir dire* and did not attempt to establish

any facts concerning a process of interrogation on the part of the undercover agent. In fact, he later established with the two heretofore mentioned exceptions, that the undercover agent was specifically instructed only to listen to petitioner and that she had followed those instructions. [Rep. Tr. pp. 1102, 1112; A. pp. 58, 66.] Later, in cross-examination, counsel for the first time developed that the undercover agent had been instructed by the Sheriff to bring a newspaper article and two fictitious conversations to the attention of petitioner which might have provoked comment by her; however. it was never shown that any incriminating statements whatsoever were provoked by these matters. Certainly; any comments of petitioner that might have been provoked by these matters were not introduced into evidence by the prosecution nor were they introduced by the defense.

Under California law counsel for petitioner could have requested that the trial court take evidence outside of the presence of the jury on the issue of whether the statements made by petitioner to the undercover agent were voluntary and were not obtained in violation of petitioner's right to counsel and against self-incrimination. *People v. Schader,* 62 Cal. 2d 716, 727-728. In that case the California Supreme Court held that pursuant to the case of *Jackson v. Denno,* 378 U.S. 368 (1964) and the case of *People v. Gonzales,* 24 Cal. 2d 870. 876-877, this procedure should be followed by the trial court. Counsel for petitioner made no such request for the obvious reason that after having reviewed the report of the undercover agent and after having privately interviewed her, he determined that it was in the best interests of his client that the un-

dercover agent be permitted to testify. This is the only reasonable conclusion that can be drawn from the record. The trial court had not ruled that counsel would not be permitted to introduce evidence on the issue of the foundation for the undercover agent's testimony. There had been no objection, no complaint, and no ruling on the applicability of the *Massiah*, *Escobedo* or *Dorado* decisions. There had merely been a discussion in chambers of the applicable law which was never renewed by counsel. An objection not raised at the trial will not be considered on certiorari to the United States Supreme Court. *Brown v. Allen*, 344 U.S. 443, 480 (1952). A procedural default which is held to bar challenge to a conviction in State courts even on Federal Constitutional grounds prevents implementation of the Federal right. *Henry v. Mississippi*, 379 U.S. 443, 447 (1965).

Counsel for petitioner made no attempt to have the testimony of the undercover agent stricken. The great bulk of her testimony was favorable to the defense, as already pointed out. [Rep. Tr. pp. 1101-1112; A. pp. 57-67.] Having deliberately chosen to waive her constitutional objection to the testimony of the undercover agent and to present the undercover agent's highly favorable testimony to the jury petitioner cannot now complain. In effect, petitioner has attempted to engage in the game of sowing the seeds of reversible error in the record decried by this court in *Kotteakos v. United States*, 328 U.S. 750, 759 (1946). We submit that these seeds are infertile and should not be cultivated by this court.

Petitioner relies on some inapposite language in the opinion of the Fourth District Court of Appeal in the

instant case in arguing that there is no waiver in the State of California when there is a deliberate failure to object to the introduction of statements obtained in violation of the *Massiah* and *Escobedo* decisions. In this opinion the District Court of Appeal said at 144:

> ". . . and if we had the slightest idea that defendant was injured by it we would have no hesitancy in ordering a reversal in spite of the fact of defendant's failure to object to Peggy's testimony."

The reference to the failure to object was not a holding that petitioner was entitled to raise the point on appeal absent an objection because the court went on to hold that petitioner was precluded from raising a point by reason of the failure to object. *People v. Miller, supra,* 245 Cal. App. 2d 112, 144. The above statement was made to emphasize the fact that there was no possible prejudice from the introduction of the undercover agent's testimony. It was necessary for the District Court of Appeal to emphasize harmless error because of the fact that the California Supreme Court had not as yet set down a rule for the necessity of an objection based upon the *Dorado-Escobedo* error. However since the decision in this case the California Supreme Court decided *People v. Doherty, supra,* 67 A.C. 1, 6-7.

The circumstances of this case preclude any conclusion that the statements of petitioner made in the presence of the undercover agent fall within the exclusionary rules of the *Massiah* and *Escobedo* decisions. Furtheremore, the record clearly shows a deliberate, knowing, intelligent and tactical waiver of a claim under those rules.

II.

THE INTRODUCTION INTO EVIDENCE OF PETITIONER'S CUMULATIVE STATEMENTS UNDER THE CIRCUMSTANCES OF THIS CASE WAS HARMLESS IN CONFORMITY TO THE CONSTITUTION OF THE UNITED STATES.

Petitioner contends that this court should not extend the harmless error rule to the introduction of statements secured by unconstitutional police behavior in violation of the *Massiah* and *Escobedo* rules, basing this contention upon previous cases decided by this court and certain policy considerations. The decisions of this Court do not require that a prejudicial error *per se* rule be applied to criminal convictions where evidence of admissions secured in violation of the *Massiah* and *Escobedo* rules may have been received. Indeed they clearly support the application of a harmless error rule to such evidence. The policy considerations urged by petitioner are unsound in view of the overriding value of a properly applied harmless error rule to the administration of justice.

A confession, in criminal law, is a statement by a person accused of crime to the effect that he is guilty of the crime. Unless the statement is broad enough to include every essential element to make out a case against him, it is not a confession of guilt. An admission, in contrast is but an acknowledgment of some fact or circumstance which in itself is insufficient to authorize a conviction and which only tends toward the ultimate proof of guilt. *In re Cline*, 255 A.C.A. 135, 142 (1967) (and cases cited therein).

In *Chapman v. California*, 386 U.S. 18 (1967) it was urged that all federal constitutional errors regardless of the facts and circumstances must always be deemed harmful. The adoption of such a rule was declined. It was held that the harmless error statutes and rules of the States and the United States to the effect that judgments shall not be reversed for "errors or defects which do not affect the substantial rights of the party" applied to constitutional errors; and that there are some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction. It was held that some constitutional rights are so basic to a fair trial that their infraction can never be treated as harmless error and that a constitutional error in admitting plainly relevant evidence which possibly influenced the jury adversely to a litigant cannot be conceived of as harmless under the rule that the proper approach to harmless error is "whether there is a reasonable possiblity that the evidence complained of might have contributed to the conviction." *Chapman v. California, supra*, p. 23.

It follows that a constitutional error resulting in the introduction of inadmissible evidence may be deemed harmless if it did not result in the denial of a constitutional right basic to a fair trial and the evidence introduced could not have contributed to the conviction.

A. Petitioner Was Not Denied a Constitutional Right Basic to a Fair Trial by the Unelicited Acquisition of Her Pre-Indictment Admissions in the Absence of Counsel.

The lack of the assistance of counsel at certain stages of the prosecution must almost invariably deny a fair trial, for example, at the trial itself, *Gideon v. Wainwright,* 372 U.S. 335, or at some forms of arraignment, *Hamilton v. Alabama,* 368 U.S. 52, or on appeal, *Douglas v. California,* 372 U.S. 353. However, the secret or in-custody interrogation situations of *Massiah* and *Escobedo* and the identification confrontation situation in *Wade* and *Gilbert* do not invariable deny a fair trial in the absence of counsel. *Johnson v. New Jersey, supra,* 384 U.S. 719; *Stovall v. Denno,* 388 U.S. 293. (1967). Nor does the lack of protection of the Fifth Amendment privilege against self-incrimination in the above situations, absent a coerced confession, invariably prevent a fair trial. *Tehan v. Shott,* 382 U.S. 406 (1965); *Johnson v. New Jersey, supra,* 384 U.S. 719 *Stovall v. Denno, supra,* 388 U.S. 293.

In the cases of coerced confessions and counsel both at the trial and on appeal the principle "applied went to the fairness of the trial—the very integrity of the fact finding process" and averted "the clear danger of convicting the innocent." *Linkletter v. Walker,* 381 U.S. 618, 639 (1965); *Tehan v. Shott,* 382 U.S. at 416; *Johnson v. New Jersey, supra,* 384 U.S. at 727-728.

> ". . . Moreover, coerced confessions are excluded from evidence because of 'a complex of values,' Blackburn v. Alabama, 361 U.S. 199 (1960), including 'the likelihood that the confession is untrue'; 'the preservation of the individual's freedom

of will'; and '"[t]he abhorrence of society to the use of involuntary confessions."' At 207. Cited with approval in Jackson v. Denno, 378 U.S. 368, 385-86 (1964)." *Linkletter v. Walker,* 381 U.S. 618, 638 (1965).

But there is less likelihood of unreliability or coercion present under the situations encompassed by the *Massiah, Escobedo* and similar rulings. *Linkletter v. Walker, supra,* 381 U.S. 618, 638 (1965); *Johnson v. New Jersey, supra,* 384 U.S. 719, 730 (1966).

". . . Each constitutional rule of criminal procedure has its own distinct functions, its own background of precedent, and its own impact on the administration of justice, and the way in which these factors combine must inevitably vary with the dictate involved. . . ."

Johnson v. New Jersey, supra, 384 U.S. at 728.

The prime purpose of the *Escobedo* ruling:

". . . is to guarantee full effectuation of the privilege against self-incrimination, the mainstay of our adversary system of criminal justice . . . to assure that the person who responds to interrogation while in custody does so with intelligent understanding of his right to remain silent and of the consequences which may flow from relinquishing it. In this respect the rulings secure scrupulous observance of the traditional principle, often quoted but rarely heeded to the full degree, that 'the law will not suffer a prisoner to be made the deluded instrument of his own conviction.' Thus while *Escobedo* and *Miranda* guard against the possibility of unreliable statements in every in-

stance of in-custody interrogation, they encompass situations in which the danger is not necessarily as great as when the accused is subjected to overt and obvious coercion."

Johnson v. New Jersey, supra, 384 U.S. at 729-730.

The law on coerced confessions is available to persons as a safeguard. *Johnson v. New Jersey, supra,* 384 U.S. at 730.

". . . [T]he Fifth Amendment's privilege against self-incrimination is not an adjunct to the ascertainment of truth. That privilege, like the guarantees of the Fourth Amendment, stands as a protection of quite different constitutional values—values reflecting the concern of our society for the right of each individual to be let alone. . . ."

Tehan v. Shott, 382 U.S. at p. 416.

Statements obtained in the circumstances of the *Escobedo* and *Massiah* cases may well be voluntary (Stewart J. dissenting in *Escobedo v. Illinois,* 378 U.S. 478, 494) as well as highly reliable and relevant (White J. dissenting in *Massiah v. United States,* 377 U.S. 201, 208 and *Miranda v. Arizona,* 384 U.S. 436, 538).

We therefore reach the conclusion in the instant case that, "All that petitioner attacks is the admissibility of evidence, the reliability and relevancy of which is not questioned," and which had no effect on the outcome. *Linkletter v. Walker, supra,* 381 U.S. at 639.

B. The Introduction Into Evidence of Petitioner's Unelicited Pre-Indictment Admissions Did Not Affect the Outcome of the Trial.

Petitioner by analogy to the coerced confession cases contends that admission of her jail cell statements is so fundamental an error that therefore the harmless error rule cannot save the judgment. She invokes the rule that the admission of an involuntary confession in evidence requires reversal regardless of other evidence of guilt presented to the jury, citing: *Bram v. United States,* 168 U.S. 532 (1897); *Haynes v. Washington,* 373 U.S. 503 (1963); *Rogers v. Richmond,* 365 U.S. 534 (1961); and *Paine v. Arkansas,* 356 U.S. 560 (1958).

In a coerced confession case despite adequate evidence before the jury to sustain the verdict the conviction must be reversed because where "a coerced confession constitutes a part of the evidence before the jury and a general verdict is returned, no one can say what credit and weight the jury gave to the confession." The judgment must be reversed because the admission in evidence over objection of a coerced confession vitiates the judgment. *Payne v. Arkansas,* 356 U.S. 560, 568 (1958).

> ". . . [R]eliance on a coerced confession vitiates a conviction because such a confession combines the persuasiveness of apparent conclusiveness with what judicial experience shows to be illusory and deceptive evidence. A forced confession is a false foundation for any conviction, while evidence obtained by illegal search and seizure, wire tapping, or larceny may be and often is of the utmost verity. Such police lawlessness therefore may not void State convictions while forced confessions will do so."
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> *Stein v. New York,* 346 U.S. 156, 192 (1952).

It follows therefore that almost invariably a confession will constitute persuasive evidence of guilt and it is therefore usually extremely difficult to determine what part it played in the securing of the conviction. These considerations justify treating involuntary confessions in a class by themselves and refusing to inquire whether in rare cases their admission into evidence had no bearing on the result. *People v. Parham,* 60 Cal. 2d 378, 385-86 (1963). In that case it was stated:

> "Unlike involuntary confessions, other illegally obtained evidence may be, as in this case, only a relatively insignificant part of the total evidence and have no effect on the outcome of the trial. To require automatic reversal because of its admission is to lose sight of the basic purpose of the exclusionary rule to deter unconstitutional methods of law enforcement. (Elkins v. United States, 364 U.S. 206, 217 [80 S.Ct. 1437, 1453, 4 L.Ed. 2d 1688, 1669]; Mapp v. Ohio, 367 U.S. 643, 656 [81 S.Ct. 1684 6 L.Ed.2d 1081, 1090-1091]; People v. Cahan, 44 Cal.2d 434, 443, 445 [282 P.2d 905, 50 A.L.R. 2d 513].) Unless we were to take the unprecedented step of holding that the state must be penalized for violating a defendant's constitutional rights in securing evidence by conferring an immunity upon him (See People v. Valenti, 49 Cal.2d 199, 203 [316 P.2d 633]), we must consider the deterrent effect of the exclusionary rule not as a penalty but as derived from the principle that the state must not profit from its own wrong. (Walder v. United States, 347 U.S. 62, 64-65 [74 S.Ct. 354 98 L.Ed. 503, 506-507]; McDonald v. United States, 335 U.S. 451, 456 [69 S.Ct. 191 93 L.Ed. 153, 158-159]; People v. Mar-

tin, 45 Cal.2d 755, 760 [290 P.2d 855].) The State does not so profit when erroneously admitted evidence does not affect the result of the trial. A reversal for the admission of illegally obtained evidence without regard for prejudice when there is compelling legally obtained evidence of guilt constitutes nothing more than a penalty, not for the officer's illegal conduct in securing the evidence, but solely for the prosecutor's blunder in offering it and the trial court's error in admitting it. To require automatic reversal for such harmless error could not help but generate pressure to find that the unreasonable police conduct was lawful after all and thereby to undermine constitutional standards of police conduct to avoid needless retrial. (See People v. Mickelson, 59 Cal.2d 448, 452 [30 Cal. Rptr. 18, 380 P.2d 658]; People v. Ditson, 57 Cal. 2d 415, 439-440 [20 Cal.Rptr. 165, 369 P.2d 714].) An exclusionary rule so rigidly administered could thereby defeat itself. . . ."

In the case of *People v. Dorado*, 62 Cal. 2d 338, 356 (1965) which was based on the *Escobedo* decision it was held that although under some circumstances the introduction into evidence of statements obtained from a defendant during police interrogation in violation of his right to counsel and his right to remain silent may constitute harmless error, the error is necessarily prejudicial when the statements are confessions. The improper introduction of a confession which has been obtained in violation of the constitutional right to counsel transgresses the protection of due process no less than the illegal introduction of a confession which had been coerced and Courts cannot inquire into the

prejudicial nature of the introduction of an illegally obtained confession for the reasons stated in *People v. Parham* (1963), 60 Cal. 2d 378, 385.

In the case of *People v. Hillery,* 62 Cal. 2d 692, 712, 713, the court found that the trial court committed error in admitting statements of an accused in violation of the rules under *Escobedo v. Illinois, supra,* 378 U.S. 478 (1964) and *People v. Dorado, supra,* 62 Cal. 2d 338, but nevertheless found that the admission of the statements which did not constitute a confession was harmless because it was not only exculpatory but was virtually identical with the defendant's explanation at the trial. A conclusion, readily applicable to our case as argued above.

In *People v. Jacobson,* 63 Cal. 2d 319, 329-331 (1965) the California Supreme Court recognizing the holding in *People v. Parham, supra,* 60 Cal. 2d 378, 385, that almost invariably a confession will constitute persuasive evidence of guilt and it is therefore usually extremely difficult to determine what part it played in securing a conviction and that these considerations justify treating involuntary confessions in a class by themselves and refusing to inquire whether in rare cases their admission in evidence had no bearing on the result, held:

> "Nevertheless, on this record we do have a 'rare case' in which a refusal to inquire into the impact, if any, of the confession on the verdict would result in complete abandonment of article VI, section 4½, of the California Constitution."

The court went on to say:

> "Although the reports are replete with reversals for the use of improperly obtained confessions 're-

gardless of other evidence,' only one case seems to share the distinguishing factual feature here presented: *i.e.*, a case in which the defendant confessed not once but a number of times and in which most of the statements were properly obtained. In Stroble v. California (1952) 343 U.S. 181 [72 S.Ct. 599, 96 L.Ed. 872], the defendant had confessed repeatedly and the confessions were used at trial. He contended on appeal that the first confession in this sequence was coerced. The conviction was affirmed because the high court found the challenged confession voluntary. In dictum, however, the court remarked that had that confession been involuntary a reversal would have followed despite the other confessions. In explaining this view the court noted that 'the confession was a prominent feature of the trial.' (Id. at p. 190.)

"The same cannot be said in the case before us. No undue emphasis was placed on any of the confessions at the guilt phase. Each person who had witnessed defendant make an incriminating statement testified to what he had heard. No one confession contained details significantly different from the others. The two improperly obtained statements were therefore merely cumulative. Moreover, the sequence of the confessions here, where the improper statements were the last obtained, can give rise to no implication that the legally obtained confessions were 'induced' by those subsequently improperly obtained.

"The jury's task was simply to determine whether defendant spoke the truth on the day

> Kelly Babcock died or on the witness stand. There were approximately 10 separate admissions or confessions made by defendant, the number subject to varied calculations, since some began moments after others terminated. It is not plausible, having reviewed this record, to conclude that 10 statements were sufficiently more persuasive than only eight and that the elimination of two would have altered the outcome. *As stated in Fahy v. Connecticut (1963) 375 U.S. 85, 86* [*84 S.Ct. 229*, 11 L.Ed.2d 171], 'the question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction.' Under these circumstances the answer must be unequivocally negative." (emphasis added.)

It therefore appears that as of September of 1965 the law of the State of California was to the effect that the introduction into evidence of admissions or uniquely cumulative confessions in violation of the *Escobedo* and *Dorado* rules was harmless error under the test set forth by the United States Supreme Court in Fahy.[8] It is reasonably inferable that in the instant

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[8]Since that time California has consistently held that error in the introduction of statements in violation of the *Escobedo* and *Dorado* rules which are cumulative of properly admitted statements is harmless error. *People v. Mathis*, 63 Cal. 2d 416, 433-34; *People v. Talley*, 66 A.C. 363, 373 (Reversed as to co-defendant only.). Of particular significance is the fact that the defendant testifies to the same effect as the erroneously introduced statements and it is clear that the improper introduction of the statements did not impel the defendant to take the witness stand. *People v. Nye*, 63 Cal. 2d 166, 175-76 (Reversed for new penalty trial only.); *People v. Mathis*, 63 Cal. 2d 416, 432-34. In the instant case petitioner took the witness stand and restricted her testimony solely to the events on the date of the homicide. She only testified concerning the evidence of her love of Arthwell Hayton on cross-examination by the prosecution.

case the District Court of Appeal had the *Fahy* test in mind at the time that it held that petitioner had not been harmed by the introduction of her jail cell admissions. In any event, the Court was applying the *Dorado* rule and the California standard of *People v. Watson,* 46 Cal. 2d 818, is applicable to that case when applied to cases tried prior to June 13, 1966.[4]

The federal harmless error rule has been found applicable to the introduction of statements in violation of *Massiah* and *Escobedo. United States v. Guerra,* 334 F. 2d 138, 145-147 (1964), and *Puryear v. United States,* 378 F. 2d 29, 30 (1967). In *Guerra* the defendant had been arrested after indictment and taken to the office of the Assistant United States Attorney where he was questioned and during his trial his statements were brought out on the cross-examination of defendant by the prosecutor. The court in upholding the conviction on the basis of harmless error said:

> "But if we thus agree that the prosecutor acted unlawfully in attempting to interrogate Rivera after his indictment and in the absence of counsel, it by no means follows that his conviction was necessarily vitiated. For considered against the background of this case, we do not believe that one innocuous question and answer, introduced in an abortive attempt to impeach Rivera on a minor issue, c.f. Walter v. United States, 347 U.S. 62,

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The condemning web of circumstantial evidence was the compelling factor in petitioner having taken the witness stand not the admission of her love for Arthwell Hayton to the undercover agent in the jail cell.

[4] *People v. Watson,* 46 Cal. 2d 818, 835-837, holds that reversal is required only when it is the "opinion" in the sense of its belief or conviction that "it is reasonably probable that a result more favorable to the appealing party would have been reached."

74 S.Ct. 354, 98 L.Ed. 503 (1954), constitutes an incriminating 'use' of the prior statement so as to require reversal. In short, the fact that Rivera may have been unlawfully questioned does not of itself mean that all subsequent proceedings were tainted with that illegality. Indeed, the Supreme Court's order in the Massiah case specifically provided that the case was to be 'remanded to the United States District Court for the Southern District of New York for further proceedings in conformity with the opinion' of the Court. It seems noteworthy that the Court did *not* direct a dismissal of the indictment. Similarly, in the present case, is [sic] would seem senseless to hold that the government's error, even if contributing in no manner whatsoever to Rivera's conviction, precluded any possibility of bringing him to justice. If, for example, the questioning had not even been mentioned at trial and had not provided the prosecution with any clues or leads, it would have been clear that there was no relationship between the interrogation and the conviction, or the fairness of the trial itself. Under such circumstances, there is no doubt, and Rivera has conceded, that his conviction would have to be affirmed. (Citing case.)

"In this regard, the Supreme Court was careful in Massiah to emphasize that the 'use' to which the prior statement is put must be determinative. Thus, in response to the government's argument that investigation in criminal cases cannot practicably terminate with indictment, the Court conceded that 'in this case, as in many cases, it was entirely proper to continue an investigation of the suspected criminal activities of the defendant and

his alleged confederates, even though the defendant had already been indicted. All that we hold is that the defendant's own incriminating statements, obtained by federal agents under the circumstances here disclosed, could not constitutionally be used by the prosecution as evidence against *him* at his trial.' As we read this portion of the opinion, it was the *use* of Massiah's *incriminating* statements, and the correlative prejudice to the defendant, which required reversal of the conviction thus obtained; the fact that Massiah had once been unlawfully questioned did not itself mean that he could never be subsequently tried. As we have already demonstrated, in the present case, the statement obtained was *not* incriminating and the innocent use to which it was put at trial was either equivalent to no use at all or actually benefited the defendant; under these circumstances, reversal seems wholly unwarranted.

"In United States v. Kane, 322 F.2d 787 (2d Cir. 1963), we were faced with a factual situation strikingly similar to that presented here. There, in a trial before the Court without a jury, a government agent was permitted to testify as to statements made by the defendant in an interview with an Assistant United States Attorney, nine days after the defendant's appearance before a United States Commissioner for the fixing of bail, and eleven days before his arraignment on the indictment when counsel was appointed. Finding that the statements thus admitted were wholly exculpatory and corroborative of similar evidence already before the Court, we concluded that no prej-

judicial error had been committed, and affirmed the conviction in a brief, *per curiam* opinion.

"Since the possibility of prejudice to the defendant is equally as remote in the present case as it was in Kane, there is no reason why we should reach any different result here. But lest there be any doubt concerning our interpretation of Massiah, a further word seems in order. At least from the time of Powell vs. Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932), American courts have recognized that a society which denies the assistance of counsel to a defendant at a crucial stage in a criminal proceeding cannot be assured that fair and impartial justice—the indispensable objective of any judicial system—has truly been achieved. Although the road has not been without its detours, the Supreme Court's decisions in Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed. 2d 799 (1963), and now in Massiah have gone far to redress the balance between an often impoverished and generally untutored defendant and the seemingly all-powerful state, with its battery of trained attorneys and its compliment of experienced investigators. But if, at times, society's interest in bringing the guilty to justice has necessarily been subordinated to its concern for protecting the innocent or maintaining the integrity of is [*sic*] police, prosecutorial and judicial machinery, that interest has never been—and in a civilized society can never be—entirely forgotten. The day has certainly not come when courts will set a convicted criminal free for no reason other than that some practice of police or prosecution—wholly un-

related to the conviction itself—did not meet with their approval. If that unhappy day should ever arrive, the often-heard criticism that law and lawyers are interested only in 'technicalities' will have a ring of truth, and courts may rightfully be accused of exalting form above substance.

"We cannot believe that the Courts which decided Powell and Gideon and Massiah, decisions which touched at the core of our adversary system, were concerned only with technicalities of form or legal niceties. The opinions in those cases, rather, reflected an intense belief that the rules which they established were vital if the fundamental rights safe-guarded by our Constitution were to become a living reality. They were designed to ensure that a defendant unequipped or not permitted to engage counsel would not suffer for that reason; they were not intended merely to provide a defendant such as Rivera, whose interrogation without counsel contributed in no way to his conviction, with a technical means to vitiate a fair trial. If we were mechanically to invoke Massiah to reverse this conviction, we would transform a meaningful expression of concern for the rights of the individual into a meaningless mechanism for the obstruction of justice. We cannot, and will not, so act. The judgment of conviction is affirmed."

United States v. Guerra, supra, 334 F. 2d 138, 145-47 (1964).

In the state courts those decisions which have considered the question of the applicability of a harmless error rule to *Escobedo* and *Massiah* errors have applied

the rule except where a compulsion to follow without qualification the coerced confession rule of reversible per se error of the United States Supreme Court was felt. Some cases applying such a harmless-error test are: *State v. Jackson,* 100 Ariz. 91, 412 P. 2d 36 (cert. denied 385 U.S. 877); *Commonwealth v. Guerro,* 349 Mass. 277, 207 N.E. 2d 887; *Walker v. Maxwell,* 1 Ohio St. 2d 136, 205 N.E. 2d 394; *State v. Jones,* 242 Or. 427, 410 P. 2d 219; *Kilpatrick v. State,* 43 Ala. 667, 199 So. 2d 682; *Knowles v. State* (Alabama), 204 So. 2d 506; *State v. Cowans,* 10 Ohio St. 2d 96, 227 N.E. 2d 201; *Hunt v. State* (Maryland), 234 A. 2d 785; *Commonwealth v. Coyle,* 415 Pa. 379, 203 A. 2d 782; *State v. Brown* (Missouri), 404 S.W. 2d 179; *State v. Collis,* 243 Or. 222, 413 P. 2d 53; *State v. Thomas,* 248 S.C. 573, 151 S.E. 2d 855.

Long ago this court in *Kotteakos v. United States* (1946), 328 U.S. 750, this Honorable Court laid down the guidelines of the particular application of the federal harmless error rule in appellate review and in the years that followed the Federal Courts pursuant to those guidelines have found the introduction of admissions to be harmless error. In *Kotteakos* this Court stated that the purpose of section 269 of the Judicial Code was to substitute judgment for automatic application of rules and to preserve review as a check upon arbitrary action and essential unfairness in the trial. As the same time, it was to make the process perform that function without giving men fairly convicted the multiplicity of loopholes which any highly rigid and minutely detailed

scheme of errors, especially in relation to procedures, will engender and reflect in a printed record. In enacting this section, Congress intended to put an end to the too rigid application of the rule that error being shown, prejudice is presumed, and to establish a more reasonable rule that if upon an examination of the entire record, substantial prejudice does not appear, the error must be regarded as harmless. The crucial thing was the impact of the thing done wrong on the minds of other men in the total setting. The test adopted was what effect the error had or reasonably may be taken to have had upon the jury's decision. And if the error did not influence the jury or had but very slight effect the verdict of the judgment should stand except perhaps where the departure was from a constitutional norm as in coerced confession cases. Error in the introduction of evidence of the defendant's admission was held to be harmless under the rule in *Kotteakos*.

In *Neal v. United States*, 342 F. 2d 730, 736-37, and other cases federal courts have found admissions to have been harmless due to the fact that the defendant testified similarly or the evidence was cumulative. *Sadler v. United States* (10th Cir.), 303 F. 2d 664 (1962); *United States v. McGavic*, 337 F. 2d 317; *United States v. Kane, supra*, 322 F. 2d 787; *United States v. Thompson*, 366 F. 2d 167.

Petitioner builds her main argument that the extension of the harmless error rule to *Massiah* and *Escobedo* errors would necessitate overruling precedent upon the "rock" of *Bram v. United States*, 168 U.S. 532

(1897). In that case the defendant made an exculpatory statement after being told that another suspect had incriminated him. The prosecution argued there that the statement was not a confession because the man purported to deny not admit guilt. In answer to this contention the court stated:

> ". . . Having been offered as a confession and being admissible only because of that fact, a consideration of the measure of proof which resulted from it does not arise in determining its admissibility. If found to have been illegally admitted, reversible error will result, since the prosecution cannot on the one hand offer evidence to prove guilt, and which by the very offer is vouched for as tending to that end, and on the other hand for the purpose of avoiding the consequences of the error, caused by its wrongful admission, be heard to assert that the matter offered as a confession was not prejudicial because it did not tend to prove guilt. . . ."
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> *Bram v. United States, supra,* 168 U.S. at 541.

Petitioner relies on this language as being the foundation for all subsequent decisions that an admissible confession automatically requires reversal. *Bram v. United States* may well stand for that proposition but only because of its ultimate holding not because of the reasoning in the above-quoted language. This language has not been followed in subsequent decisions and has been specifically discredited in *Stein v. New York, supra,* 346 U.S. 156, 190-91 (1953). In that case in reference to the above quoted language the court said:

> ". . . But the language, while superficially applicable to the question at hand (coerced confession revers-

ible per se error), was addressed to no such problem in the *Bram* case. There the prosecution had introduce into evidence a conversation between an illegally held and uncounseled prisoner and a detective in which the prisoner stated, in reply to an allegation that one 'X' had seen the prisoner commit a crime from his vantage point at a ships wheel, that 'he [X] could not see me from there.' The Government took the position in the *Bram* case that this statement, even if not voluntary, was not a confession, since its author purported to deny, not admit guilt. The quoted language of the Court is the answer to this position. As the Court points out, the evidence was introduced on the theory that it tended to admit guilt, and only on that theory would it have been admissible. It therefore must be treated as a confession. The sentences immediately preceding the quoted language bring this out: 'It is manifest that the sole ground upon which the proof of the conversation was tendered was that it was a confession, as this was the only conceivable hypothesis upon which it could have been legally admitted to the jury. It is also clear that in determining whether the proper foundation was laid for its admission, we are not concerned with how far the confession tended to prove guilt.'

"Thus, *Bram* merely decided that a confession otherwise erroneous could not be used merely because the defendant claimed that it did not incriminate him. This is precisely what this Court subsequently held in *White v. Texas,* 310 U.S. 530.

> "In any event, the *Bram* case was a federal case where we exercised supervisory power rather than merely enforced the Fourteenth Amendment. It is not a rock upon which to build constitutional doctrine. According to Wigmore (3rd ed. Vol. 3, pp. 240-241, n. 2), this decision represents 'the height of absurdity in misapplication of the law,' and has been discredited by subsequent cases."
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> *Stein v. New York,* 346 U.S. 156, at 190-91.

Petitioner has cited the cases of *Haynes v. Washington,* 373 U.S. 503, 518 (1963); *Rogers v. Richmond,* 365 U.S. 534, 541 (1961) and *Payne v. Arkansas,* 356 U.S. 560 (1958) and argues that none of these decisions suggest that a rejection of a harmless error rule turns on any unique evidentiary impact that confessions may have. On the contrary, as we have pointed out above, *Payne* relying on *Stein v. New York, supra,* 346 U.S. 156 (1952) holds that reliance on a coerced confession vitiates a conviction because such a confession combines the persuasiveness of apparent conclusiveness with what judicial experience shows to be illusory and deceptive evidence; and that where a coerced confession constitutes a part of the evidence before the jury and a general verdict is returned, no one can say what credit and weight the jury gave to the confession. And in these circumstances, this court has uniformly held that even though there may have been sufficient evidence, apart from the coerced confession, to support a judgment of conviction, the admission into evidence, over objection of the coerced confession vitiates the judgment. The question of the presence of substantial independent evidence of guilt and the fact that an inadmissible confession played little if any role

in a conviction does not go to the question of harmless error. There is a vast difference between independent evidence of guilt and the finding that the admission of evidence could not have affected the outcome of a trial. As stated by Justice Harlan (dissenting in *Fahy v. Connecticut, supra,* 375 U.S. 85, 95):

> ". . . In any event, the standard applied here required a determination that exclusion of the unconstitutional evidence could not have changed the outcome of the trial. That is a much stricter standard than that of independently sufficient evidence, which leaves open the possibility that the trier of fact did rely on the unconstitutional evidence and, therefore, would have reached a different conclusion if the evidence had been excluded."

Haynes v. Washington at 518 relied solely upon *Rogers v. Richmond* at page 541 in disregarding the presence of substantial independent evidence tending to demonstrate the guilt of the defendant in that case. However, it must be remembered that in *Rogers v. Richmond* at pages 540-42 the trial court had found that the pretense of bringing the petitioner's wife in for questioning "had no tendency to prove a confession that was not in accord with the truth." The court had instructed the jury in the same vein. This Honorable Court held that the trial judge in admitting the confessions as "voluntary," and the Supreme Court errors in confirming the conviction failed to apply the proper standard for determining the admissibility of the confession by going into the question of truth of falsity of the confession. The language which referred to the existence of independent corroborating evidence leaving

little doubt as to the truth of the confession was directed at that point alone not to the question of harmless error.

Petitioner argues that the introduction of evidence of a defendant's out-of-court statement *implicating* himself in the crime charged is a significant step in the prosecution's attempt to obtain a conviction and has a tendency to make the prosecution's entire case seem credible. She argues that the "admission that she continued to love Hayton after her husband's death tended to 'make the prosecution's entire case seem credible.'" Firstly, petitioner's statement that she loved Arthwell Hayton did not implicate herself in crime. It was no more than a statement of the fact that she had a motive to murder her husband to overcome the assumption that a woman loves her husband and would not murder him. Secondly, in the posture of the defense that petitioner had indeed loved Arthwell Hayton and had an adulterous affair with him but no longer intended to marry him the admission was of no consequence. The question was whether, *before* the murder, petitioner had abandoned the idea of *marrying* Arthwell Hayton. The evidence of the prosecution clearly showed that although petitioner was making face-saving statements that she would never marry Hayton she was doing everything in her power to accomplish that end. There is no logical explanation and petitioner did not attempt to explain why the death of her husband would have had any effect upon her feelings for Arthwell Hayton. The crucial point is that she did not admit to the undercover agent that she intended to marry Hayton now that her husband was dead which was the only contested question on motive in issue at the trial.

C. The Purpose to Be Served by the Massiah and Escobedo Rules, the Reliance Upon the Language of These Rules by Law Enforcement Authorities and the Effect of Reversible Per Se Error With Regard to These Rules on the Administration of Justice Are Persuasive Criteria Upon Which to Determine the Applicability of the Harmless Error Rule.

In the last few years this Honorable Court has dealt with the problem of retroactivity in connection with four constitutional rules of criminal procedure. *Linkletter v. Walker, supra,* 381 U.S. 618 (1965); *Tehan v. Shott, supra,* 382 U.S. 406 (1966); *Johnson v. New Jersey, supra,* 384 U.S. 719 (1966); and *Stovall v. Denno, supra,* 388 U.S. 293 (1967). In these cases the principle was established that in criminal litigation concerning constitutional claims, "the Court may in the interest of justice make the rule prospective . . . where the exigencies of the situation require such an application." 381 U.S. at 628; 382 U.S. at 410. As stated in *Johnson v. New Jersey, supra,* 384 U.S. at 727:

> ". . . These cases also delineate criteria by which such an issue may be resolved. We must look to the purpose of our new standards governing police interrogation, the reliance which may have been placed on prior decisions on the subject, and the effect on the administration of justice of a retroactive application of *Escobedo* and *Miranda.* [citation]"

Subsequently this Honorable Court has found that the harmless error rule is applicable to error based upon violations of two of these constitutional rules of criminal procedure *i.e., Chapman v. California,* 386 U.S. 18

(comment and instructions upon a failure to testify) and *Gilbert v. California,* 388 U.S. 263, 274 (confrontations for identification purposes conducted in the absence of counsel).

In *Fahy v. Connecticut, supra,* 375 U.S. 85 (1963) the majority of this Court, in an opinion by Mr. Chief Justice Warren, left the specific question of harmless error open:

> "On the facts of this case, it is not now necessary for us to decide whether the erroneous admission of evidence obtained by an illegal search and seizure can ever be subject to the normal rules of 'harmless error' under the federal standard of what constitutes harmless error." *Fahy v. Connecticut, supra,* 375 U.S. 85 at 86.

However, the Court went on to decide that the evidence was in fact prejudicial. Therefore the error was not harmless and the conviction was reversed. The question of harmless or reversible error was framed as follows:

> ". . . The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction. To decide this question, it is necessary to review the facts of the case and the evidence adduced at trial." *Id.* at pp. 86-87.

The majority of the court then proceeded in effect to apply harmless error standards to the facts of the case. The court clearly refused to hold that the mere admission of the evidence in itself required a reversal. Instead, the court stated the rule of appellate review that it would apply and then it proceeded to do what every

state and federal appellate court does when confronted with this same question, that is, review the facts of the case and the evidence produced at trial and determine whether the error is prejudicial or harmless.

We submit that the persuasive considerations that moved this court to apply the above constitutional rules of criminal procedure prospectively to a considerable extent further moved this court to hold a harmless error rule applicable to the denial of the right to counsel in *Gilbert* and the denial of the right against self-incrimination in *Griffin v. California,* 380 U.S. 609 and that these same considerations should persuade this court to hold that a harmless error rule is applicable to the denial of the right to counsel and against self-incrimination as in *Massiah* and *Escobedo.*

If the harmless error rule may be applied in the *Massiah* and *Escobedo* situations, certainly the evidence of petitioner's cumulative statements could not have affected the outcome of the trial.

We again refer to *Johnson v. New Jersey, supra,* at 729-30:

> ". . . Our opinion in Miranda makes it clear that the prime purpose of these rulings is to guarantee full effectuation of the privilege against self-incrimination, the mainstay of our adversary system of criminal justice. See *ante* pp. 458-466. They are designed in part to assure that the person who responds to interrogation while in custody does so with intelligent understanding of his right to remain silent and of the consequences which may flow from relinquishing it. In this respect the ruling secures scrupulous observance of the

> traditional principle, often quoted but rarely heeded to the full degree, that 'the law will not suffer a prisoner to be made the deluded instrument of his own conviction.' Thus while *Escobedo* and *Miranda* guard against the possibility of unreliable statements in every instance of in-custody interrogation, they encompass situations in which the danger is not necessarily as great as when the accused is subjected to overt and obvious coercion."

As regards the need for protection of these rights, there is no meaningful distinction between interrogation before and interrogation after formal indictment so that this observation would be equally applicable to *Massiah. Escobedo v. Illinois, supra,* 378 U.S. 478, 486 (1964). Evidence obtained in violation of the *Massiah* and *Escobedo* rules may be "relevant, reliable and highly probative of the issue which the trial court has before it—whether the accused committed the act with which he is charged." (Justice White dissenting in *Massiah v. United States, supra,* 377 U.S. at 208.) This is readily ascertainable because:

> "[O]ur case law on coerced confession is available for persons whose trials have already been completed."
>
> *Johnson v. New Jersey, supra,* 384 U.S. at 730.

The conclusion must be drawn therefore that the "complex of values" and "integrity of the fact finding process" is not invariably impaired by the violation of *Escobedo* and *Massiah* rules and may therefore be harmless error.

Moreover any misconduct of the police in violating the *Massiah* and *Escobedo* rules has already occurred

and will not be corrected by releasing the prisoners involved. California has recognized the impropriety of surreptitious interrogations after indictment. *People v. Arguello,* 63 Cal. 2d 566 (1965) and in-custody interrogation *People v. Dorado,* 62 Cal. 2d 338 (1965) and has given clear direction to state courts for the future. "Certainly this is the appropriate remedy for the constitutional error committed". (Harlan J. Dissenting in *Chapman v. California,* 386 U.S. 18, 49.) If there was no harm in the error there is nothing to be gained by reversing the case merely to punish the police. We cannot believe that any police officer or prosecutor would rely on the "harmless error" rule and anticipate that every magistrate and judge involved will rule erroneously and receive the evidence and that ultimately the judgment will be affirmed by appellate justices on the ground of harmless error. We agree with Mr. Justice Harlan, that

> ". . . there is no danger that application of the [harmless error] rule will undermine the prophylatic function of the rule of inadmissibility." *Fahy v. Connecticut,* 375 U.S. at 944 (dissenting opinion).

As pointed out above in this brief, law enforcement officials involved in this case clearly relied upon previous United States Supreme Court and California Supreme Court decisions in the procedures they followed in placing the undercover agent in petitioner's jail cell. The prosecutor was under the impression that the undercover agent had been instructed only to listen. [Rep. Tr. p. 1013; A. p. 45.] It was only developed on cross-examination by counsel for petitioner after having privately interviewed the undercover agent that im-

proper matters had been brought to petitioner's attention in order to provoke comment. However, as we pointed out, no evidence of any provoked comment was introduced in the case. When law enforcement agencies fairly rely on the language of the cases and the trial courts fairly rely upon the language of these decisions and erroneously admit evidence these officials should not be penalized by mandatory reversal where it can be demonstrated beyond a reasonable doubt that the accused has suffered no prejudice as a result of the error.

In *Johnson v. New Jersey, supra,* 384 U.S. 719, 731 it was said:

> "Nor would retroactive application have the justifiable effect of curing errors committed in disregard of constitutional rulings already clearly foreshadowed. We have pointed out above that past decisions treated the failure to warn accused persons of their rights, or the failure to grant them access to outside assistance, as factors tending to prove the involuntariness of the resulting confessions. (Citing cases.) Prior to *Escobedo* and *Miranda,* however, we had expressly declined to condemn an entire process of in-custody interrogation solely because of such conduct by the police. (Citing cases.) Law enforcement agencies fairly relied on these prior cases, now no longer binding, in obtaining incriminating statements during the intervening years preceding *Escobedo* and *Miranda.* This is in favorable comparison to the situation before Mapp v. Ohio, 367 U.S. 643 (1961), where the States at least knew that they were constitutionally forbidden from engaging in unreasonable searches and seizures under Wolf v. Colorado, 338 U.S. 25 (1949).

> "At the same time, retroactive application of *Escobedo* and *Miranda* would seriously disrupt the administration of our criminal laws. It would require the retrial or release of numerous prisoners found guilty by trustworthy evidence in conformity with previously announced constitutional standards. Prior to *Escobedo* and *Miranda,* few States were under any enforced compulsion on account of local law to grant requests for the assistance of counsel or to advise accused persons of their privilege against self-incrimination."

Just as retroactive application of *Escobedo* and *Massiah* would seriously disrupt the administration of criminal laws requiring the retrial and release of numerous prisoners found guilty by trustworthy evidence in conformity with previously announced constitutional standards, to a lesser extent but of significant degree, the administration of justice is disrupted by the necessity to retry any criminal case. The necessary time involved in perfecting an appeal may well result in the loss of evidence, in the absence of witnesses, as well as the fact that the memory of man is frail and transitive. If an accused has suffered no harm by the introduction of evidence there can be no justification for the expense and agony of retrial to both the people and the accused and the possibility that due to unavoidable circumstances the guilty may not be convicted.

We think these arguments are sound in their support of prospective application of these constitutional criminal rules of procedure and equally sound in support of the application of harmless error rules to constitutional error as a result of their infraction.

D. The Proposition That Constitutional Errors Can Be Harmless Is Supported by Ample Precedent.

In applying a rule of appellate review which requires a showing of prejudice for reversal and appraising the effect of inadmissible comment in instructions upon the entire course of the proceedings of the trial, this Honorable Court in *Chapman v. California,* was carrying out sound principles announced and applied in prior decisions of this court.

In *Motes v. United States,* 178 U.S. 458 (1900) this Court unanimously applied a harmless error rule to a federal criminal judgment in which evidence had been received in violation of the defendant's rights under the Sixth Amendment to the United States Constitution. Several defendants were tried for conspiracy to violate federal civil rights. Taylor, one of the defendants, confessed and testified to the killing at the preliminary hearing. Federal officials negligently allowed him to escape before trial. At the trial, his testimony was read into the record. Motes testified that he and Taylor had done the killing. All defendants were convicted and appealed. Judgment was reversed as to the other defendant and affirmed as to Motes.

This Court held that the use of Taylor's statements violated the Sixth Amendment rights of all defendants, but did not prejudice Motes because of his judicial confession, which was regarded as conclusive evidence of guilt.

> "... We can therefore say, upon the record before us, that the evidence furnished by Taylor's statement was not so materially to the prejudice of Columbus W. Motes as to justify a reversal of

> the judgment to him. It would be trifling with the administration of the criminal law to award him a new trial because of a particular error committed by the trial court, when in effect he has stated under oath he was guilty of the charge preferred against him." *Id.* at 476.

A similar rule was applied by this Court in reviewing a state conviction in which there was a violation of the defendant's right to be present during the proceedings, a right at that time deemed analogous to the rights conferred by the Sixth Amendment. Even though the defendant was not permitted to be present at a viewing of the scene of the offense by the jury, although his attorney was present, this Court affirmed a murder conviction with a death sentence on the ground that no prejudice was shown. *Snyder v. Massachusetts,* 291 U.S. 97 (1934).

Similarly, violations of the defendant's privilege under the Fifth Amendment, as implemented by federal statute, have been held not to constitute reversible error *per se,* but to be subject to the waiver doctrine (*Johnson v. United States,* 318 U.S. 189 [1943]) and to be subject to a form of the harmless error rule. *Wilson v. United States,* 149 U.S. 60 (1893). See also *Haines v. United States,* 188 F. 2d 546; *United States v. Donnelly,* 179 F. 2d 227; *Cloud v. United States,* 361 F. 2d 627 (8th Cir. 1966); *United States v. Knox Coal Company,* 347 F. 2d 33 (5th Cir. 1965); *Coleman v. Denno,* 223 F. Supp. 938 (Sdny 1963), affirmed sub nom; *United States v. Denno,* 330 F. 2d 441 (2d Cir. 1964).

As already noted above, this Honorable Court has recognized that in the situation of a confrontation for

identification in the absence of counsel there is a deprivation of the right to counsel and a danger of deprivation of the right against self-incrimination. The error well may be harmless. *Gilbert v. California, supra,* 388 U.S. 263, 274 (1967). We firmly believe, in view of the opinion in *Fahy v. Connecticut, supra,* 375 U.S. 85 (1963), the concurring opinion of Justice Stewart in *Chapman v. California, supra,* 386 U.S. 18, 44 and the dissenting opinion of Harlan J. in *Chapman v. California, supra,* at 50 that the application of the harmless error rule to the introduction of illegally seized evidence is clearly foreshadowed.

In summary, this precedent is highly persuasive and we feel dispositive of the question of the applicability of the harmless error rule to *Massiah* and *Escobedo* violations unless there are strong policy reasons to the contrary. Petitioner has set forth weak policy considerations that are entitled to very little weight.

E. There Will Be No Inordinate Difficulty in the Application of a Harmless Error Rule to Admissions.

Petitioner contends that the application of a harmless error rule to *Massiah* and *Escobedo* violations will place an undue burden on this and other appellate courts in reviewing cases involving those errors. It is argued that it is inconsistent to refuse to draw a distinction between confessions and admissions for the purpose of determining a violation of *Massiah* and *Escobedo* and yet draw such a distinction for the purpose of determining whether the admission of such evidence was prejudicial. The distinction between admissions and confessions is generally workable as the experience in Cali-

fornia has proved. *People v. Powell*, 67 A.C. 25, 47. In the event that a statement of an accused cannot be so categorized, the usual result will be that the statement is tantamount to a confession in its impact on the trier of fact and therefore prejudicial. The burden upon an appellate court is not great because under the rule of *Chapman v. California* the appellate court must be convinced beyond a reasonable doubt that the introduction of an admission could not have affected the verdict. The burden rests upon the prosecution to prove this fact beyond a reasonable doubt. Unless the prosecution shoulders the load and meets this burden the appellate court has no other alternative but to reverse. When the prosecution has set forth sufficient facts and arguments to demonstrate beyond a reasonable doubt that the evidence introduced could have had no effect upon the outcome of the trial the lack of prejudice is self-evident. For the most part the United States Supreme Court may rely upon the State courts in the application of the harmless-error rule as will be argued below.

It is entirely consistent to distinguish between admissions and confessions for the purpose of determining harmless error yet deny that distinction for the purpose of determining that there was error. There is no justifiable reason for a constitutional right to depend on the extent to which a statement has incriminating tendencies whereas the question of prejudice is a factual one and the distinction between an admission and a confession is not so much a category as it is a label placed upon a statement that has lesser to no incriminating tendencies. It is the type of decision which judges are called upon to make in the exercise of their judicial

functions. It is not novel; it is traditional. Whatever burden may be involved this court readily assumed in *Chapman.*

F. There Was No Prosecutorial Misconduct.

Petitioner relies upon *Berger v. United States,* 295 U.S. 78, a case involving deliberate and gross misconduct by a prosecuting attorney to argue that a harmless-error rule should not be applied to the facts of this case. Petitioner charges the district attorney with intentional misconduct in deliberately introducing evidence he knew to be unconstitutionally obtained. The record does not justify such a conclusion. The instructions given to the undercover agent and the statements of the district attorney to the court at the time the evidence was offered clearly indicate that there was an attempt to comply with previous decisions of this Court and the California Supreme Court, as we have argued above. The improper conduct of the undercover agent which took place after she had been placed in the jail cell at the instigation of the sheriff has not been shown on this record to have been within the knowledge of the district attorney. His statements to the court support such a conclusion. [Rep. Tr. pp. 1010-1013; A. pp. 43-45.] The facts with regard to this conduct were brought out on cross-examination by the defense after it was given the opportunity to privately interview the undercover agent who had been unavailable until that time. [Rep. Tr. pp. 1009-10, 1105, 1108; A. pp. 42-43, 60, 63.] The California District Court of Appeal did

not find that the prosecution was guilty of misconduct. When we speak of misconduct it must be noted that defense counsel examined the undercover agent on *voir dire* and deliberately withheld examination into this subject matter until cross-examination after the testimony of the witness on direct examination had already been admitted and it would be too late for the trial court to have prevented the introduction of unconstitutionally obtained evidence. There was no objection on the part of the defense that the district attorney was guilty of deliberate misconduct in producing this evidence even though the facts were known to the defense long before the witness took the stand. It is obvious that the defense was interested in seeding the case with constitutional error that could not be corrected and that strategy has now reached its final culmination before this Court. We do not feel that the strategy should be rewarded under the circumstances of this case when no harm to petitioner has been shown.

Petitioner has categorized the error in this case as "two-stage" arguing that constitutional error took place both in the jail cell and in the court room. This court has never had occasion to decide whether a separate denial of a constitutional right occurred when unconstitutionally obtained evidence was used in a trial. The Fourteenth Amendment provides, in part, that: "No state shall . . . deprive any person of life, liberty or property without due process of law." This language implies that there can be no denial of due process until a person has actually been deprived of life, liberty or

property. It follows that the mere use during a trial of unconstitutionally obtained evidence does not, in itself, violate due process, since the person against whom such evidence has been used may nonetheless be acquitted, and one who has been acquitted cannot be said to be denied due process. The logical conclusion is that a denial of due process has occurred only when a conviction has been obtained through the use of unconstitutionally obtained evidence.

The basic premise of the harmless error rule, as applied in the *Massiah* and *Escobedo* type circumstances, is that the evidence played no part in determining the conviction. This being true, how can it be said that the introduction at trial of unconstitutionally obtained evidence which in fact is harmless constitutes a separate denial of constitutional rights? Therefore, if one of the purposes of the exclusionary rule in *Massiah* and *Escobedo* is to rectify the denial of a constitutional right, the right in question is the right to avoid being convicted through the use of unconstitutionally obtained evidence. If the harmless error rule is applied in order to hold that such evidence played no part in securing a conviction, then the harmless error rule does not prevent the fulfillment of this purpose of the exclusionary rule. As this Court has observed, with regard to illegally seized evidence, the exclusionary rule can never rectify the primary violation of the Fourth Amendment—the unreasonable search and seizure itself;

> "[T]he ruptured privacy of the victims' homes and effects cannot be restored. Reparation comes too late." *Linkletter v. Walker, supra,* 381 U.S. 618, 637 (1965).

G. The Application of the Harmless Error Rule to the Evidence of Petitioner's Jail Cell Statements Will Serve the Useful Purpose of That Rule and Will Not Impair the Deterrent Effect of the Exclusionary Rules of Massiah and Escobedo.

Petitioner argues that the application of the harmless error rule to the intentional introduction of unconstitutionally obtained evidence would prompt prosecuting attorneys to disobey the law and gamble with the precious product of their labors, *i.e.*, the conviction of criminals, and that the salutory purpose of the harmless-error rule would not be served in such cases. In effect petitioner is arguing that the application of a harmless-error rule to any error should depend upon whether the error was unintentional and in good faith. The record in this case is clear that the prosecutor in good faith attempted to follow the law of the United States Supreme Court and the California Supreme Court, however, we do not feel that the harmless-error rules of all of the States and the United States were ever intended to be a prize only to be utilized upon a showing of good faith. This has not been the practice of the courts and is not a relevant consideration as stated in *Chapman v. California*, 386 U.S. 18 at 22:

> ". . . All of these rules, state or federal, serve a very useful purpose insofar as they block setting aside convictions for small errors or defects that have little, if any, likelihood of having changed the result of the trial."

And at page 23:

> "'. . . The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction. . . .'"

We do not have in this case a persistent course of deliberate misconduct on the part of the prosecuting attorney. This is demonstrated by the very brief and what later proved to be innocuous questions asked of the undercover agent. Petitioner has failed to show any connection between the improper conduct of the undercover agent and the statements which the prosecuting attorney introduced at the trial.

We do not dispute the proposition that misconduct and lawless law enforcement must be deterred. The point is that failure to apply the harmless-error rule will not deter the violations of constitutional rights because it does not bear directly or indirectly upon the protection of the United States Constitution. The constitutional standards governing the interrogation of persons accused of crimes are expressed in many opinions of this court and of the state and federal appellate courts and California has sought as best it could to comply with those standards and apply them to state procedures. Whether or not the harmless error rule survives in *Massiah, Escobedo* and similar cases will not in any way expand or increase the protection of the Constitution. It is conceivable, as Chief Justice Traynor pointed out in *People v. Parham, supra,* that a rule requiring reversal without regard to the effect of the error might, consciously or subconsciously, induce appellate judges to limit the scope of the Constitution to prevent unnecessary and unwarranted reversals. It is inconceivable, however that withholding of the harmless error rule could in any way expand the protection of the *Massiah* and *Escobedo* rules.

Take the case at bar as an example. The District Court of Appeal held that the jail cell statements of

petitioner were unconstitutionally obtained under *Dorado*. This ruling is binding upon law enforcement officers, prosecutors, trial courts and magistrates. In declaring the conduct of the undercover agent indefensible, the State Appellate Court was performing its historic office of interpreting and applying the Constitution and both declaring the rights of the citizenry and the duty of law enforcement officers and lower courts. The publication of the opinion gives guidance to officers and lower court judges and prosecutors so that they can conform with constitutional requirements in the future. The State Appellate Court had another historic office to perform. And that was to dispose of the case at hand. In determining whether the conviction would be affirmed or reversed the State appellate court had to abide by the California Constitution, as the Justices have sworn to do, and appraise the effect of the erroneously admitted evidence in light of the outcome of the trial. It did so, and determined that a reversal was not warranted. But, in arriving at this conclusion the court was not concerned with the Fifth and Sixth Amendments, with the duty of officers and prosecutors under those amendments or with the rights of citizens under those amendments. It was concerned only with the effect of the evidence, regardless of the reason for its inadmissibility. The difference in these functions should be clearly recognized.

It is clear then that the harmless-error rule, or to put it more accurately, the rule governing the disposition of cases on appellate review, is a rule of judicial administration which regulates the relations between appellate courts and trial courts. It is not a rule that measures the nature and extent of constitutional

rights. It neither enhances nor limits constitutional rights. Nevertheless, petitioner argues that the harmless-error rule does have an effect on the enforcement of the rules governing the interrogation of those accused of crime in that the rule will tempt "some prosecutors to take unsavory gambles by introducing unconstitutionally obtained statements which they regard as potentially helpful to their case, but which they believe an appellate court may, on a cold record, regard as harmless." Presumably, petitioner would also argue that the police may be tempted to obtain unconstitutionally induced statements to offer to the prosecution for this unsavory purpose. It would not stretch petitioner's argument to add that trial court judges will resolve differences of opinion against constitutional rights again relying on that self-same saving grace.

This argument conjures up a spectacle which, if true, might give pause to the court. The trouble is that the argument is based on both an unrealistic and naive view of the impact of the exclusionary rules upon police activity and the function of the district attorney's office. Deterrence is mainly achieved by informing and training law enforcement officers so that they can comply with the requirements of the constitutional rules of criminal procedure. The education and training of law enforcement officers does not spring full blown from the minutes of the state appellate courts or of this Court. A costly and demanding program is required, and it is probably fair to say that we have only started on an adequate program of this kind. Nevertheless, such programs are the only answers to insuring the protections of the constitutional rights of the individual and insuring that admissible evidence is se-

cured so that guilty persons may be apprehended and removed from society.

We do not, of course, dispute the conclusions that the exclusionary rules in *Massiah* and *Escobedo* and similar rules are necessary in order to put teeth into the constitutional guarantees sought to be protected by these rules. But the exclusionary rule in California is given effect in a variety of ways. Probably the most important effect, from the standpoint of the citizens, arises from the restraint shown by police officers when they feel, as a result of the educational and training programs earlier mentioned, that they cannot lawfully interrogate a suspect under the circumstances and in light of the controlling principles of law. If the officer secures statements under questionable circumstances the question of the compliance with the *Massiah, Escobedo* and similar rules will be reviewed by the district attorney in determining whether to issue a felony complaint or take the case to the grand jury, and there is no question that the product of many interrogations are excluded at that time. Thus, the impact of the exclusionary rule is frequently felt before the case ever reaches the court. Probably the impact is most significant upon a police officer when his own superior refuses to take the case to the district attorney because he has doubts about the statements obtained or when the district attorney rejects the case on the ground that the statements would be inadmissible at the trial.

If the district attorney feels that he can proceed with the case, the defendant may object to the evidence at the preliminary examination and the magistrate will exclude the evidence if he is satisfied that there was a violation of the *Massiah, Escobedo* or similar cases,

and the case goes no further. If the magistrate receives the evidence and the defendant is bound over to the Superior Court, he may move to set aside the information under section 995 of the Penal Code and in most cases raise the question of the introduction of statements obtained by the police. If that motion is denied he may apply to the Court of Appeal under section 999(a) of the Penal Code for a writ of prohibition raising the question of the above case rules. If the Court of Appeal denies this petition he may petition the California Supreme Court for a hearing. If he is unsuccessful in his pretrial motions and in seeking appellate review, he may raise the question again during the trial by a timely objection to the evidence. If that objection is overruled and he is convicted, he may again raise the question on motion for a new trial in the Superior Court. If that motion is denied he may appeal from the judgment of conviction or order granting probation and raise the question in the appellate court.

We cannot believe that any police officer or prosecutor would rely on the "harmless error rule" and anticipate that every magistrate and judge involved would rule erroneously and receive the evidence and that ultimately the judgment would be affirmed by the appellate justices on the ground of harmless error.

In any event, the prosecutor does not decide questions of admissibility; he can only offer evidence. Our experience does not indicate that the trial judges in California are the submissive dupes that petitioner seems to imagine them to be. If anything, the complaints we receive from the district attorneys would tend to indi-

cate a reluctance to receive evidence which is questionable in any degree on the theory, which is a sound one from the trial judge's standpoint, that he cannot err in excluding prosecution evidence. He will never be reversed for sustaining an objection to the People's evidence.

We repeat our agreement with Mr. Justice Harlan, that ". . . there is no danger that application of the [harmless error] rule will undermine the prophylactic function of the rule of inadmissibility." *Fahy v. Connecticut*, 375 U.S. at 94 (dissenting opinion).

To accept petitioner's misconduct argument would be tantamount to holding that whenever the question of the admissibility of evidence under the *Massiah, Escobedo* and similar rules is decided erroneously in favor of the prosecution, the prosecuting attorney may be charged as deliberately introducing unconstitutional evidence. The various factual situations that prosecutors and courts will encounter in the infinite future as has been demonstrated by the search and seizure cases throughout the years will inevitably result in some erroneous rulings. Men will always differ as to the evaluation of factual situations. If convictions result from such erroneous rulings, the harmless error rule will serve the salutory purpose of saving those convictions where it can be shown beyond a reasonable doubt that the erroneous rulings could not have affected the outcome. In the final analysis justice is served by the affirmance of a conviction unaffected by constitutional error.

CONCLUSION.

This judgment should be affirmed because there is no showing upon this record that the introduction of petitioner's jail cell statements deprived her of the constitutional right to counsel and against self-incrimination in that the statements were made prior to the instigation of judicial proceedings and were not elicited by law enforcement authorities either indirectly or through a process of interrogation after petitioner had requested the presence of her attorney. In fact, petitioner (having consulted with her attorney and in disobedience of his instructions), had already agreed to speak to the investigating officer, thereby waiving any argument that she desired the presence of counsel when she talked to authorities. Furthermore, the statements were introduced into evidence while not at the instigation of the defense certainly with its deliberate acquiesence for patent purposes of defense strategy.

Furthermore, the judgment should be affirmed because the introduction of the jail cell statements of petitioner were entirely consistent with her defense namely that she was in love with Arthwell Hayton but had given up any idea of marrying him. Contrary to the assertion of petitioner at page 31, in her brief the defense did not attempt to show that her infatuation with Arthwell Hayton had ended before her husband's death. She admitted that right up to the time of her husband's death she was still in love with Arthwell Hayton. The defense attempted to show instead that petitioner had given up any hope of *marrying* Arthwell Hayton, however, it was clearly demonstrated, as argued by the district attorney, that she still *loved* Arthwell Hayton and was only saying that she no longer

intended to *marry* him whereas her conduct clearly indicated that she fully intended to marry Arthwell Hayton after her husband's death. The testimony of the undercover agent added nothing to the evidence of the prosecution that had not already been introduced through petitioner's statements to the police and to her friends and associates. Furthermore, petitioner's testimony established beyond any question that she was in love with Arthwell Hayton right up to the time of her husband's death which was the only period of time relevant to motive. Considering the over-all length of the district attorney's argument the testimony of the undercover agent was not relied upon but completely underplayed. The jail cell statements were not even mentioned in the opening statement of the prosecution and the only use of the statement in final arguments was to show a slight inconsistency between appellant's testimony that the love had ended at the moment of petitioner's husband's death and her statements to the undercover agent. The likelihood that love ended so abruptly could not have seriously been considered by the jury. The district attorney's opening statement is set forth at pages 1-28 of the Reporter's Transcript and his argument concerning matters relative to petitioner's motive is set forth in the Reporter's Transcript at pages 2018-21, 2023-28, 2029-30, 2033, 2038-40, 2058-67, 2265-66, 2271-72, 2274-75, A. pp. 103-122, 130-134.

We have demonstrated beyond any reasonable doubt that there was no reasonable possibility that this evidence could have contributed to the conviction. *Chapman v. California, supra,* at pp. 23-24. As we have pointed out in our brief, at the time that the District Court of Appeal decided that the evidence of petitioner's jail

cell statements had not harmed her California was following the standards set forth in *Fahy v. Connecticut, supra,* at pp. 86-87. The language of the District Court of Appeal clearly evidences the fact that that court passed beyond the question of reasonable doubt and reached the certain conclusion that the introduction of the jail cell statements had not harmed petitioner and had therefore not had any effect whatsoever upon the outcome of the case. The court stated:

> ". . . and if we had the slightest idea that defendant was injured by it we would have no hesitancy in ordering a reversal . . ." *People v. Miller, supra,* 245 Cal. App. 2d 112, 144.

The Court clearly indicated that it was ready to reverse the case in the event of any possibility of harm but found none. In view of the fact that the error in this case was based upon the *Dorado* rule, the California standard for harmless error found in *People v. Watson, supra,* 46 Cal. 2d 818, 835-37, is applicable in any event. Thus a remand for reconsideration is not required. We respectfully request that this Honorable Court, after examination of the record and consideration of the above points and authorities, affirm the conviction, if need be, by the application of the doctrine of *Chapman v. California* to the instant case.

Respectfully submitted,

THOMAS C. LYNCH,
Attorney General,

WILLIAM E. JAMES,
Assistant Attorney General,

PHILIP C. GRIFFIN,
Deputy Attorney General,

Attorneys for Respondent.